No. 04-52

Title:	Bertram Rice, Warden, et al., Petitioners v. Steven Martell Collins
Docketed:	July 13, 2004
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(01-56958)
Decision Date:	November 7, 2003
Rehearing Denied:	April 8, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 7 2004	Petition for a writ of certiorari filed. (Response due August 12, 2004)
Jul 7 2004	Appendix of Bertram Rice, Warden, et al. filed.
Aug 11 2004	Brief of respondent Steven Martell Collins in opposition filed.
Aug 11 2004	Motion for leave to proceed in forma pauperis filed by respondent.
Aug 25 2004	DISTRIBUTED for Conference of September 27, 2004.
Jun 13 2005	DISTRIBUTED for Conference of June 16, 2005.
Jun 20 2005	DISTRIBUTED for Conference of June 23, 2005.
Jun 23 2005	DISTRIBUTED for Conference of June 27, 2005.
Jun 28 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 28 2005	Petition GRANTED.
Jul 14 2005	Motion to appoint counsel filed by respondent Steven Martell Collins.
Jul 20 2005	Motion DISTRIBUTED for Conference of September 26, 2005.
Jul 20 2005	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including August 29, 2005.
Jul 25 2005	SET FOR ARGUMENT on December 5, 2005.
Aug 5 2005	CIRCULATED.
Aug 29 2005	Joint appendix filed (2 vols.). (Distributed).
Aug 29 2005	Brief of petitioners Bertram Rice, Warden, et al. filed. (Distributed)
Aug 29 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Aug 29 2005	Brief amici curiae of Arizona, Colorado, et al. filed. (Distributed)
Sep 19 2005	Extension of time within which to file the respondent's brief on the merits to and including October 17, 2005
Oct 3 2005	Motion to appoint counsel filed by respondent GRANTED. Mark R. Drozdowski, Esq., of Los Angeles, California is appointed to serve as counsel for the respondent in this case. The Chief Justice took no part in the

	consideration or decision of this motion.
Oct 13 2005	Further extension of time within which to file respondent's brief on the merits to and including October 19, 2005.
Oct 19 2005	Brief of respondent Steven Martell Collins filed. (Distributed)
Oct 28 2005	Record received from U.S.C.A., 9th Circuit., (1 envelope)
Oct 28 2005	Record received from USDC for District of California. (1 envelope)
Nov 18 2005	Reply of petitioner Bertram Rice, Warden filed. (Distributed)
Dec 5 2005	Argued. For petitioners: William W. Lockyer, Attorney General, Sacramento, Cal. For respondent: Mark R. Drozdowski, Los Angeles, Cal.

Supreme Court, U.S.
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No. 04 52

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, et al., *Petitioners,*

v.

STEVEN MARTELL COLLINS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. *Section 2254(d) of Title 28 of the United States Code provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ." Section 2254(e)(1) provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."*

The Question Presented is:

Does 28 U.S.C. § 2254 allow a federal habeas corpus court to reject the presumption of correctness for state fact-finding, and condemn a state-court adjudication as an unreasonable determination of the facts, where a rational fact-finder could have determined the facts as did the state court?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

BERTRAM RICE, et al.,, *Petitioners,*

v.

STEVEN MARTELL COLLINS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner Bertram Rice, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The Ninth Circuit's opinion is reported as *Collins v. Rice*, 348 F.3d 1082, 1088 (9th Cir. 2003), *opinion modified and superseded on denial of rehearing*, 365 F.3d 667 (9th Cir. 2004). The order of the United States District Court for the Central District of California is unreported. Each is reproduced in the Appendix to this Petition. Additional relevant orders are also reproduced in the Appendix, including the unpublished opinion of the California Court of Appeal affirming the judgment of conviction.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit reversing the judgment of the District Court and remanding the matter with instructions to grant the writ of habeas corpus was filed on November 7, 2003. App. B. The Ninth Circuit's denial of the Warden's petition for rehearing with suggestion for rehearing en banc, with modifications to the opinion and the dissent from the denial of rehearing en banc, were filed on April 8, 2004. App. A. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> . . . .
>
> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a

> determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The Crime

On March 19, 1996, after a traffic stop, respondent Collins was arrested pursuant to an outstanding arrest warrant. During a search, .10 grams of rock cocaine was discovered in Collins' possession.

The State Court Proceedings

Collins was tried for possession of rock cocaine. During voir dire, Prospective Juror 16 informed the court that she lived in Inglewood, California, was single, had no children, no prior jury experience and worked as an automations clerk for the Federal Aviation Administration. Prospective Juror 16 also stated that no one close to her had ever been accused of drug related offenses, that she had no reason to believe drug dealers were in her neighborhood, and that she believed possession of rock cocaine should be against the law. Finally, Prospective Juror 16 said that neither she nor anyone close to her had had a problem with alcohol or drugs, and that she had never been employed in law enforcement. App. I at 125-30.

The prosecutor exercised four peremptory challenges – two White prospective jurors (Prospective Jurors 6 and 8) and two African-American prospective jurors (Prospective Jurors 16 and 19) were excused. After the prosecutor exercised her peremptory challenge against the second African-American prospective juror, the defense objected to the peremptory challenges under *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890 (1978), which prohibits the use of peremptory challenges to remove prospective jurors on the basis of group bias, i.e., an identifiable group distinguished on racial, religious, ethnic, or similar grounds. App. A at 15-16; I at 157; J at 182.

During the hearing on the *Wheeler* objection, defense counsel noted that the last two jurors excused by the prosecution were both African-Americans. The prosecutor responded that she had excused "two white people and two Black people," and that there were still two people of color in the prospective jury panel. The trial court determined that a prima facie case of racial discrimination had been established and asked the prosecutor to justify her peremptory challenges of Prospective Jurors 16 and 19. The prosecutor responded as follows:

> Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes.
>
> I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. [¶] She and Mr. 006 (White male) were both single, no ties.
>
> . . . .
>
> That was the reason for excusing her, rather than her being an African-American.
>
> 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

App. A at 16.

The trial court asked the prosecutor whether she had any additional justification for excusing Prospective Jurors 16 and 19. The prosecutor noted that Collins was an African-American male, that the two jurors excused were African-American females, and that an African-American male and another female who appeared to be African-American were still seated on the panel. During the subsequent discussion, the prosecutor asked

whether the court wanted case law supporting her reasons for dismissing the jurors. App. A at 16-17.

After the prosecutor mentioned gender, defense counsel asserted that the prosecutor was seeking a "more male-female balance" or older people on the jury. After further discussion, the prosecutor clarified that she had referred to the prospective jurors' gender in relation to their lack of ties to the community. App. A at 17-19; J at 183-84.

After this exchange, the trial court denied the *Wheeler* objection, stating:

> With regard to 016, the Court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also.
>
> The court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016. [¶] So the motion under the *Wheeler* case is denied at this time. . . .

App. A at 18; J at 184.

The jury found Collins guilty and the trial court sentenced him to state prison for twenty-five years to life. App. J at 174.

On direct appeal, Collins alleged that the trial court improperly denied the *Wheeler* motion as to Prospective Juror 16 only. Collins asserted that, because the trial court had not observed the juror's demeanor, she had been improperly dismissed solely because of her age, in violation of his federal constitutional rights. App. J at 179-93. Deciding the issue under both *Wheeler* and *Batson v. Kentucky*, 476 U.S. 79 (1986), the California Court of Appeal affirmed, stating that there was no caselaw supporting the proposition that young people are a "cognizable class" and that the prosecutor therefore had articulated a legitimate race-neutral reason for excusing Prospective Juror 16. The Court of Appeal further found that,

even if her youth were not a valid reason for challenging Prospective Juror 16, the prosecutor also had stated that she dismissed her because she had rolled her eyes and turned away from the trial court when the trial court spoke to her, conduct that could have been indicative of hostility or disrespect. Even though the trial court did not observe the prospective juror's behavior, the Court of Appeal found that the record, including the trial court's decision to give the prosecutor the benefit of the doubt as to Prospective Juror 16's demeanor, indicated the trial court approached its task appropriately and thus the conclusions reached by the trial court were entitled to great deference. App. H at 112-17.

The California Supreme Court denied Collins' petition for discretionary review.

The Federal Habeas Corpus Proceedings

Collins filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction on the ground that Prospective Juror 16 had been improperly dismissed solely because of her age, because the trial court had not observed the juror's demeanor, in violation of his federal constitutional rights. The district court denied the petition, finding that Collins had not rebutted the trial court's finding, that the prosecutor's two reasons for excusing Prospective Juror 16 were legitimate and race-neutral, with clear and convincing evidence and that "the decisions of the state courts were not contrary to, or an unreasonable application of, clearly established federal law." App. F at 101-05.

In a published 2-to-1 opinion, the Ninth Circuit reversed. Reviewing the same state court record, but reaching conclusions diametrically opposed to those reached by the state trial court, the panel held that the state courts' findings that the prosecutor had challenged Juror 16 on the basis of the juror's age and demeanor amounted to an "unreasonable determination of the facts" under § 2254(d)(2); that "clear and convincing" evidence

proved that the prosecutor's stated reasons were pretexts for racial discrimination under § 2254(e)(1); and that, under §2254(d)(1), the state appellate court had engaged in an "unreasonable application" of clearly established Supreme Court precedent in deciding that the trial court had fulfilled its *Batson* duty to determine whether Collins had established purposeful discrimination. App. A at 35-40; App. B at 76-81.

In dissent, Judge Hall concluded that the majority had actually conducted a *de novo* review regarding the credibility of the prosecutor and her stated reasons for dismissing Prospective Juror 16, and had merely given lip service to the appropriate Anti-Terrorism and Effective Death Penalty Act (AEDPA) standard of deference for the state court's factual findings. App. A at 40-45; B at 82-89. Judge Hall noted,

> Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications.

App. A at 45; B at 89.

The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc. In dissent, Judge Bea (with whom Judges Kleinfeld, Gould, Tallman and Callahan joined) also criticized the majority for conducting a *de novo* review by

> demean[ing] demeanor evidence and nitpick[ing]the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion.

App. A at 8.

The Warden filed a motion to stay the issuance of the

mandate in the Ninth Circuit pending this Court's disposition of the case. On April 29, 2004, the Ninth Circuit granted the motion. App. C.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case for two reasons. First, the Ninth Circuit's rejection of the state court's witness-credibility findings conflicts with this Court's jurisprudence on the scope of the federal review of factual determinations governed by the habeas-corpus statutory presumption of correctness. Second, the Ninth Circuit's reliance upon 28 U.S.C. § 2254(d)—a provision that is itself another tight restriction on federal-court power—as a source of authority to defeat the statutory presumption of correctness raises an important issue concerning the construction of the habeas corpus statute, is inconsistent with this Court's teaching on the subject, and conflicts with constructions of the statute endorsed by at least one other circuit court of appeals.

1. Before Congress overhauled the federal habeas corpus statutes by enacting AEDPA in 1996, former 28 U.S.C. § 2254(d) prescribed a presumption of correctness for state-court fact determinations, conditioned by a number of specific contingencies and exceptions. For instance, under former § 2254(d)(6), the presumption did not apply when "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." Likewise, under former § 2254(d)(8), the presumption did not apply when the state court factual determination was not "fairly supported by the record." App. K.

But, in enacting current § 2254(e)(1) as part of AEDPA, Congress deleted those contingencies and exceptions. Section § 2254(e)(1) now provides simply that a state court's factual determination "shall be presumed to be correct" unless the prisoner carries the burden "of rebutting the presumption of

correctness by clear and convincing evidence." In addition, through §§ 2254(d)(1) and (d)(2), Congress now has precluded habeas corpus relief entirely for claims adjudicated on their merits by the state court, unless the state court decision was "contrary to, or involved an unreasonable application of" this Court's clearly established law or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In the instant case, the state courts made findings that the prosecutor challenged Prospective Juror 16 on account of her youth and demeanor, not her race. There can be no doubt that such findings were made, either explicitly or implicitly. See *Townsend v. Sain*, 372 U.S. 292 (1963) (recognizing presumption for explicit or implicit findings). Nor can there doubt that the state-court record contained support for those findings.

First, the prosecutor stated that those were her reasons. App. A at 16-17. And, in accepting the prosecutor's reasons and overruling Collin's objection, the trial judge explained that the juror in fact was "youthful," and further expressed its determination to accept the juror's "roll[ing] her eyes" as an additional reason for the challenge. App. A at 18. On direct appeal, Collins conceded that the juror's youth was in fact the prosecutor's motivation; he argued instead that youth was not a legally sufficient reason for the strike. App. J at 187-92. The state appellate court upheld the prosecutor's "reliance on prospective juror no. 016's youth" as proper, and further ruled that the challenge was proper in light of the prosecutor's statement about the juror's eye-rolling demeanor and the trial judge's determination to give the prosecutor the benefit of the doubt with respect to her stated reasons. App. H at 115-17. Likewise, the Ninth Circuit recognized that the trial judge "appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications" (App. A at 22, 31 n.11, 35), that the state appellate court had determined that the prosecutor had

dismissed the juror because of her age (App. A at 24, 26 n.8, 31, 35), and that the state appellate court reasonably determined that the trial judge had accepted demeanor as an alternate reason "on account of the prosecutor's credibility." App. A at 31. Conversely, there was no evidence that Prospective Juror 16 was not young or that she had not rolled her eyes as described by the prosecutor. As this Court has made clear, a state court's determination under *Batson* to credit the prosecutor's stated reasons as true is essentially a factual finding entitled to great deference. *Hernandez v. New York*, 500 U.S. 352, 364 (1991) ("the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal"). And, under the language of AEDPA's strengthened statutory presumption of correctness in § 2254(e)(1), a factual determination by the state court is simply to be "presumed correct" in habeas corpus proceedings, unless the applicant rebuts it with "clear and convincing evidence."

2. Here, however, the Ninth Circuit did not properly hold Collins to that AEDPA standard. Instead, rejecting the direct statement of the prosecutor that the state courts had credited, the 2-to-1 panel majority treated potential competing inferences from mere circumstantial evidence as "clear and convincing evidence" under § 2254(e)(1) that the prosecutor's reasons in fact were race-based. The 2-to-1 majority also rejected the state court's adjudication of the *Batson* claim, based on the state courts' acceptance of the truth of the prosecutor's explanation, as an "unreasonable determination" of the facts under § 2254(d)(2) and as an "unreasonable" application of *Batson* under § 2254(d)(1). None of these grounds was correct, and the Ninth Circuit's reliance on them raises an important question deserving of certiorari review.

a. In overriding the § 2254(e)(1) presumption, the Ninth Circuit disregarded the trial judge's observations of the juror and the prosecutor, and instead drew tenuous, non-necessary inferences from circumstantial evidence in a "cold" record to

support a contrary account of the facts. The panel majority's rejection of the state court's credibility determination was wrong under the AEDPA restrictions on habeas corpus and would have been wrong even under pre-AEDPA law that was more favorable to granting the writ. For, as this Court has held, a federal habeas court may not second-guess the state trial judge on the issue of witness credibility. *Marshall v. Longberger*, 459 U.S. 422, 434 (1983) ("federal habeas courts [had] no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"); *LaVallee v. DellaRose*, 410 U.S. 690 (1973).

It may be true that a state-court credibility determination might be overcome in circumstances where no rational fact-finder could have determined the facts as the state court did. This arguably might occur in some extreme situations if the credited witness was not personally observed by the state judge or if physical evidence completely refutes the witness' testimony. *Cf. Miller-el v. Cockrell*, 537 U.S. 322, 339 (2003) (suggesting that credibility findings might be overcome); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) (records in fact did not contain information witness said they contained). But no such circumstances obtain in this case.

Here, in contrast, the panel majority re-determined the credibility findings of a trial judge who had the benefit of its first-hand observations of the prosecutor's conduct, responses, and demeanor. And a rational fact-finder could have concluded that the prosecutor's stated reasons for the strikes were genuine. The prosecutor's explanation did not describe any physical impossibility. To the contrary, her statements found factual support in the state record. To overcome such a credibility finding, the Warden submits, the proffered "clear and convincing evidence" should leave no doubt about the matter, *see Schneiderman v. United States*, 320 U.S. 118, 135 (1943), in the sense that no rational fact-finder could have found otherwise. *See Hernandez v. New York*, 500 U.S. at 369 ("[w]here there are two permissible views of the evidence, the

factfinder's choice between them cannot be clearly erroneous").

b. Similarly, in otherwise finding fault with the state-court credibility determination, the Ninth Circuit simply drew different inferences from circumstantial evidence. For example, the Ninth Circuit concluded that the prosecutor was not credible because she had made an "incorrect factual statement" regarding not Prospective Juror 16, but Juror 19 instead, by identifying her as young when she was actually a grandmother. App. A at 33. As Judge Hall explained in her dissenting opinion, however, the prosecutor merely had mis-spoken in the course of a *Batson* discussion that pertained to challenges to both Prospective Jurors 16 and 19 and also to Prospective Juror 6, a young White male. App. A at 41-43. Even if the competing inference drawn by the panel were arguable, however, it was hardly compelling and cannot logically be deemed mandatory.

In a similar vein, the panel drew an adverse inference from the prosecutor's statement that a youthful juror might be too tolerant of drug offenses. App. A at 27. Again, even if not wholly inexplicable, the inference drawn by the panel was neither compelling not necessary. The same is true for other adverse inferences drawn by the panel from the fact that the prosecutor had declined to challenge a juror whose child had a cocaine problem, and from the fact that the prosecutor had alluded to a "male-female balance" on the jury. App. A at 28-30, 33-34. Such inferences, here arguable at best but never mandatory in the sense that all reasonable judges would be compelled to credit them over the prosecutor's denial, cannot suffice as a basis to reject state court findings to the contrary. *See Hernandez*, 500 U.S. at 369.

3. The Ninth Circuit also concluded that the state court's credibility and factual findings were not fairly supported by the record and that, therefore, the state-court's *Batson* adjudication was based on an "unreasonable determination of the facts" within the meaning of § 2254(d)(2). And it further concluded that the state trial court, in crediting the prosecutor's stated

reasons, had engaged in an "unreasonable application" of *Batson* within the meaning of § 2254(d)(1). App. A at 31-40. Trumping the § 2254(e)(1) presumption through the use of § 2254(d), however, presents an important question warranting this Court's attention.

a. Neither (d)(1) nor (d)(2) can serve as a tenable basis for overcoming the (e)(1) presumption. The AEDPA's fundamental re-working of habeas corpus review in § 2254(d), strictly limiting even further federal court authority to grant the writ on claims adjudicated on their merits in state court, cannot properly be employed as an affirmative grant of authority to reject state-court fact determinations otherwise protected by the presumption of correctness in § 2254(e)(1). Employing § 2254(d) to permit relief based on the federal court's view of whether the state ruling was fairly supported by the record or whether the state procedures were adequate, as the panel employed it here (App. A at 34-35), would negate Congress' strengthening of the presumption in (e)(1) by, in effect, reading back into the habeas-corpus statutes a kind of "intrinsic review" of state court findings that Congress removed when it deleted the list of pre-conditions and exceptions to the pre-AEDPA version of the presumption in the first place. *Cf.* Former § 2254(d)(6), (d)(8).

b. Such employment of the § 2254(d) to trump or to reduce the effect of § 2254(e)(1) conflicts with this Court's statements, in *Miller-el v. Cockrell*, 537 U.S. at 341-342, that (d) and (e)(1) are "independent" provisions and that the petitioner must satisfy each provision before obtaining relief. It also appears to conflict with this Court's application of those provisions in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Before granting relief, *Wiggins* found both (d)(2) and (e)(1) satisfied. *Id.* at 2538-39. Indeed, *Wiggins* helps establish that it is when the state fact-finding protected by the (e)(1) presumption indeed has been overcome by "clear and convincing evidence to the contrary" presented in the state proceeding—there, the physical evidence showed that the state fact-finding could not possibly

have been correct—that a resulting state-court adjudication may be deemed "unreasonable" under (d)(2). In other words, until overcome by "clear and convincing evidence" pursuant to (e)(1), state-court factual determinations are "presumed to be correct" and, as such, cannot logically be deemed "unreasonable" under (d)(1) or (d)(2).

c. The Ninth Circuit's apparent employment of § 2254(d), and the alleged inadequacy of the state record and the alleged insufficiency of the state judge's inquiry at the *Batson* hearing, to trump § 2254(e)(1), also conflicts with constructions of those AEDPA provisions in other Circuits. In *Valdez v. Cockrell*, 274 F.3d 941, 950-51 & n.17 (5th Cir. 2001), the Fifth Circuit explained that it would be "untenable" to conclude that Congress' AEDPA deletion of the pre-conditions to the pre-AEDPA statutory presumption had been rendered ineffective by § 2254(d), and it rejected the notion that (d)(2) and (e)(1) should be read together to re-import a "full and fair hearing" prerequisite to the operation of the presumption. In *Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir. 2000), the Seventh Circuit reached a similar conclusion. In this regard, the State of California in *Mueller v. Nunes*, No. 03-15509, has filed a certiorari petition on the issue of whether the "full and fair hearing" requirement survives the strengthened AEDPA presumption of § 2254(e)(1), and this Court recently ordered the respondent in that case to file a brief in opposition to the State's petition.

4. As evidenced by the many cases decided in which this Court over and over was constrained to step in and reverse Ninth Circuit misapplications of § 2254(d)(1). *E.g.*, *Yarborough v. Alvarado*, 124 S. Ct. 2140 (2004)); *Middleton v. McNeil*, 124 S. Ct. 1830 (2004) (per curiam); *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (per curiam); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), the Circuit has repeatedly failed to give California state-court rulings the deference they deserve under the AEDPA. *See Clark*

v. *Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003). A new series of cases shows that the Circuit is compounding its AEDPA failures by failing to defer under §§ 2254 (d)(2) and (e)(1) to state-court resolutions of factual questions. *E.g.*, *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004) (relying on hearsay to reject state court findings, after evidentiary hearing, that police officer's account of interrogation was creditable and that the defendant's contrary account was not creditable); *Sanders v. A.A. Lamarque*, 357 F.3d 943 (9th Cir. 2004) (rejecting state court finding that a juror was prejudiced); *Hall v. Director of Corrections*, 343 F.3d 976 (9th Cir. 2003) (rejecting state-court finding, made after evidentiary hearing, that written notes had not been doctored to change their meaning); *Avila v. Galaza*, 297 F.3d 911 (9th Cir. 2002), cert. dismissed, 538 U.S. 919 (2003) (rejecting state-court findings, made after evidentiary hearing, that new defense witnesses were not credible and none would have been available to testify at trial).

CONCLUSION

For all of these reasons, the Warden respectfully asks the Court to grant the petition for writ of certiorari.

Dated: July 6, 2004

Respectfully submitted,

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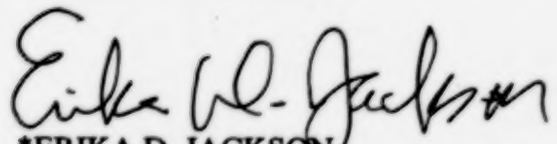

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(2) Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, et al., *Petitioners,*

v.

STEVEN MARTELL COLLINS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME I OF I

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN MARTELL COLLINS, *Petitioner-Appellant*, v. BERTRAM RICE; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Respondents-Appellees.*	No. 01-56958 D.C. No. CV-98-09329-TJH ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted
June 5, 2003–Pasadena, California

Filed November 7, 2003
Amended April 8, 2004

Before: Cynthia Holcomb Hall, Sidney R. Thomas, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Hall

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that substantial evidence can support a drug offender's contention that the prosecutor dismissed an African American juror because of her race, where the prosecutor's justifications for dismissing the juror on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in the case (lack of community ties), and wee not applied equally to white jurors (single with no children); and where one of the prosecutor's justifications was patently discriminatory (gender), while one of her justifications for dismissing another African American was contrary to the record (age).

Appellant Steven Collins petitioned for a writ of habeas corpus in district court under 28 U.S.C. § 2254, alleging that race motivated the prosecutor's peremptory strikes against two African-American women, Juror 016 and Juror 019, a middle-aged grandmother, during jury selection prior to his California state court trial for possession of a controlled substance. The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be too tolerant for this type of case, (2) her demeanor, (3) her marital status–Single with no ties, (4) her lack of ties to the community, and (5) her gender. The prosecutor did not strike a white juror who possessed the same objective characteristics as Juror 016. The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The prosecutor also struck Juror 019, noting her youth and daughter's former

drug problem. The jury found Collins guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of 25 years to life in state prison.

The California Court of Appeal affirmed Collins' conviction and sentence, concluding that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral. The California Court of Appeal determined that because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective Juror 016 based solely on her age. However, noting that nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective Juror 016's demeanor, indicated that the trial court did not approach its task appropriately, the appellate court determined that the trial court's decision was entitled to deference. The California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus. The district court denied Collins' federal habeas petition.

Collins appealed.

[1] The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. **[2]** Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation. **[3]** Youthful age and demeanor are not characteristics peculiar to a given race or group-based presuppositions applicable in all criminal trials to African-American jurors. **[4]** Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 was not contrary to, or an unreasonable application of, clearly established law.

[5] Although age has been upheld as a proper basis for excusing a potential juror, the prosecutor attempted to equate Juror 016's youthful age with a possible bias favoring criminal defendants facing drug charges. **[6]** According to the Supreme Court, Juror 016's age had to be related to the particular case to be tried. Instead, the prosecutor's reason for excluding Juror 016 related to the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community. **[7]** Not only was the prosecutor's statement that Juror 016 had a lack of ties in the community not sufficiently clear and reasonably specific, but it was also not supported by the record and did not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. **[8]** There was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age.

[9] There was substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrated that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also showed that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrated that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

[10] Collins thus showed by clear and convincing evidence that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. **[11]** Contrary to the appellate court's assessment of the record the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016. The appellate court's contrary determination demonstrated that it unreasonably concluded that the trial court had fulfilled its duty to determine whether Collins had shown purposeful discrimination. **[12]** It had to be concluded that the state trial appellate court committed constitutional error that warranted the grant of a writ of habeas corpus under § 2254. The judgment of the district court had to be reversed.

Judge Hall dissented, writing that both the majority opinion and the record were devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with no permissible alternative but to reject the prosecutor's race-neutral justifications.

COUNSEL

Karen H. Bucur, Laguna Hills, California, argued the case for the appellant.

Erika D. Jackson, Deputy Attorney General, Los Angeles, California, argued the case for the appellees.

ORDER

The opinion filed November 7, 2003 is **AMENDED** as follows:

1. Page 15915, line 14: delete "and 019" and change "Jurors" to "Juror."

2. Footnote 12, line 2: after "challenge" insert "because the prosecutor labeled Juror 019 'young' even though Juror 019 was a grandmother.

3. Delete the first full paragraph on page 15917.

4. Delete "her pretextual justifications for dismissing Juror 019," on line 2-3 of the last paragraph on page 15917.

5. The first full sentence on page 15919 should be amended to read: "The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age)."

6. Footnote 15, lines 16-17: change "three reasons were not applied to comparably similar jurors who were not struck" to "one reason was not applied to a comparable similar juror who was not struck."

7. Delete the following from page 15922: ", while her justification based on Juror 019's daughter's past cocaine addiction was pretextual given that a white juror (Juror 030) with comparably similar characteristics was permitted to serve on the jury."

8. Page 15922, line 19: change "Jurors" to "Juror" and delete "and 019".

With these amendments, the panel majority has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Hall voted to grant the petition for panel rehearing, and recommended granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

BEA, Circuit Judge with whom **KLEINFELD**, **GOULD**, **TALLMAN**, and **CALLAHAN**, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's denial of the state's petition for a rehearing en banc because the majority opinion seriously undermines the ability of a trial court to judge the sincerity of counsel's reason for a peremptory challenge to a juror when a *Batson/Wheeler*[1] challenge is made.

Collins is an African American who was convicted of possession of 0.1 grams of rock cocaine. It was his third felony conviction; he was sentenced to 25 years to life under California's "three strikes" law. The sentence in this case is harsh; from it, the majority opinion makes bad law.

On the basis of the prosecutor's peremptory challenge of *one* African American prospective juror, the majority opinion reverses a denial of habeas corpus and orders a new trial.

---

1. *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

The trial court enquired of and listened to the prosecutor's race-neutral reasons for using a peremptory strike against an African American prospective juror, weighed the evidence both for and against concluding that the strike was racially motivated, and decided the prosecutor was credible and that her reasons for making the strike were indeed race-neutral. The Court of Appeal affirmed.

In reversing this determination on the habeas petition, the majority opinion demeans demeanor evidence and nitpicks the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion. Instead of reviewing the evidence for clear error the majority conducted a denovo review in this case.

The majority opinion completely disregards the evidence supporting the trial judge's decision that the prosecutor was being truthful when she said she struck Juror 016 on the following permissible grounds: Juror 016 was young; the prosecutor thought Juror 016 appeared too tolerant for this type of case; Juror 016 had exhibited disrespect for the court by turning away and rolling her eyes when requested to answer "Yes" or "No" rather than "Uh-huh"; and Juror 016 was single, with no ties to the community.

The majority says it finds compelling evidence sufficient to overcome the deference it says it accords trial court credibility findings in three particulars: the prosecutor said that Jurors 016 and 019 were both young, when in fact 019 was a grandmother;[2] the trial judge said he did not personally see

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2. This was an incorrect observation, but one not objected to or rebutted by defense counsel. From the colloquy it appears that everyone in that room knew the prosecutor meant to compare Juror 016 to Juror 006.

Juror 016 roll her eyes in disrespect;[3/] and the prosecutor said she was also challenging Juror 016 due to her gender, a ground which the trial judge immediately rejected as unconstitutional.

The prosecutor's statement that Juror 016 rolled her eyes is critical to this case. If someone rolls her eyes when another speaks to her, the eye-rolling implies disrespect and rejection. The panel opinion concluded, irrationally, that because the trial judge did not see the eye-rolling, the state appellate court was unreasonable in approving the prosecutor's strike. The reason this is irrational is that it does not matter whether the state trial judge noticed the eye-rolling, or even whether there actually was any eye-rolling. All that matters is whether the prosecutor intentionally lied about the eye-rolling to make an excuse for getting an African American woman off the jury. If the prosecutor was really striking Juror 016 because she thought the juror rolled her eyes and not because she was African American, she had a right to strike her, even if she was mistaken about whether the eye-rolling actually occurred. In this case, the trial judge thought the prosecutor was telling truth, and the state appeals court saw no reason to doubt it.

The record is uncontradicted that while the prosecutor was stating her reasons for the exercise of this single challenge, she was at all times within the sight of the trial judge, who observed her demeanor and sincerity. Indeed, at the end of counsel's presentation on the issue, the judge commented he would give the "benefit of the doubt" to the prosecutor's reason for the challenge.

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3. Defense counsel remained mute as to whether she had seen Juror 016 roll her eyes in disrespect. California law allows the trier of fact to consider the failure to deny or explain contrary evidence as probative of that evidence. *See* Cal. Evid. Code § 413; Cal. BAJI 2.04.

Without the benefit of the trial judge's observations and on a cold record containing ample evidence supporting the prosecutor's stated reasons for the strike, the majority concludes that the state court's findings amount to a misapplication of *Batson* and an objectively unreasonable deduction from the evidence presented.

That conclusion in effect eliminates the ability of the trial judge to make determinations of sincerity and credibility based on observation of counsel's demeanor in justifying a peremptory challenge. This is directly contrary to the teachings of the Supreme Court:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judge's province."

Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (citations omitted).

Although acknowledging *Hernandez*, the majority opinion in effect eliminates the rule that requires us to defer to the trial judge on credibility findings in *Batson* challenges. Now, our panels can pick and choose among bits of circumstantial evidence, whether or not that evidence was challenged at trial or on appeal, to determine whether an attorney was telling the truth in her reasons for peremptory strikes, without regard to the

attorney's demeanor.[4] *See* Judge Hall's dissent. 348 F.3d at 1100.

The value of the trial judge's observation of demeanor in determining credibility has long been a mainstay of our jurisprudence:

> There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility. As the Supreme Court stated in *Anderson v. City of Bessemer* 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518[] (1985): "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575, 105 S. Ct. 1504[.] Live testimony enables the finder of fact to see the witness's physical reactions to questions, to assess the witness's voice–matters that cannot be gleaned from a written transcript. Because the district judge is able to hear testimony live and to view the witnesses as they testify, his credibility findings are entitled to deference on appeal.

United States v. Mejia, 69 F.3d 309, 315 (9th Cir. 1995).

The prosecutor represented that she saw Juror 016 roll her eyes in disrespect for the trial court, and the trial judge believed she was truthful. The majority opinion now requires that trial

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4. This directly conflicts with the California jury instruction that allows juries to consider "the demeanor and manner of the witness while testifying" in determining the believabilty of a witness. *See* Cal. BAJI 2.20. If juries are allowed to weigh a witness' credibility, there is no logical reason a trial judge cannot do the same.

judge to detail why he thought the prosecutor *was* credible, or else this court will presume she was *not*. Why we should presume a prosecutor, who is an officer of the court, is not credible when the trial judge found that she was is beyond all logic. For a contrary result in a similar case, see *Williams v. Rhoades*, 354 F.3d 1101 (9th Cir. 2004), which properly accorded deference to the trial judge's findings in a *Batson* challenge.

In addition, the panel's opinion, although citing 28 U.S.C. § 2254(d), departs from the spirit, if not the letter, of the statute in its application of the statute to the facts in this case. As noted, the panel substitutes its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court. The panel then insists that any perspective other than its own, must be unreasonable. In my opinion, this is not consistent with the statute's limitation of federal habeas relief to instances where the state court decision "was contrary to, or involved an unreasonable application of clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

En banc rehearing was necessary to avoid arguments between counsel battling over whether the standard in *Collins* or the standard in *Williams*[5] applies. Those battles will now rage with no end in sight. Accordingly, I respectfully dissent from the denial of rehearing en banc.

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5. *See Williams v. Rhoades* 354 F.3d 1101 (9th Cir. 2004) where three African Americans were struck, habeas relief denied, and that denial affirmed by this court.

OPINION

PAEZ, Circuit Judge:

Steven Collins appeals the district court's order denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. During jury selection prior to his state court trial for possession of a controlled substance, Collins, an African-American male, alleged that race motivated the prosecutor's peremptory strikes against two African-American women in the jury venire in violation of *People v. Wheeler*,[1] but the state trial court rejected Collins' *Wheeler* motion. The jury found him guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of twenty-five years to life in state prison.[2] The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we conclude that the California Court of Appeal's decision that the prosecutor did not engage in purposeful discrimination during jury selection represents (1) an unreasonable determination of the facts in light of the evidence presented at trial, and (2) an objectively unreasonable application of clearly established law. Accordingly, we reverse with instructions to grant the petition.

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1. 22 Cal. 3d 258 (1978).

2. *See* Cal. Penal Code Ann. § 667(e)(2)(A) (West 1999).

BACKGROUND

After Collins was discovered in possession of 0.10 grams of powder cocaine in March 1996, the State of California charged him with possession of a controlled substance in violation of California Health and Safety Code section 11350(a). When jury selection began, the trial court excused ten of the original thirty-three members of the venire. Of the remaining twenty-three, three appeared to be African-American.[3]

During voir dire, Juror 016, one of two African-American women in the venire, stated that she lived in Inglewood, California, was single, had no children, no prior jury experience, no prior employment experience in law enforcement; and worked as an automations clerk for the Federal Aviation Administration. She also stated that no one close to her had ever been accused of a drug-related offense, nor had anyone close to her had a problem with alcohol or drugs, and that she had no reason to believe that drug dealers operated in her neighborhood. When asked whether she thought that possession of rock cocaine ought to be against the law, she answered "yes." Juror 016 also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on a case involving drug charges. The prosecutor exercised a peremptory challenge to excuse Juror 016.

Juror 019, the other African-American woman in the

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3. At a later point in the proceeding, the prosecutor argued that there were in fact four African-American jurors in the venire. She identified one female juror as being "of" African-American color, black color," but defense counsel clarified that although she was a "woman of color," this juror was not in fact African-American.

venire, told the court that she lived in Inglewood, California, was single with seven grown children,[4] and was currently a retired nurse. She also stated that she had no relatives or close friends in law enforcement and had never had an experience with a police officer that was "particularly positive or particularly negative." At one time, her youngest daughter had a problem with drugs. Juror 019 had no idea what kind of drugs but thought that it might have been cocaine. Juror 019 stated that she "was involved in" her daughter's struggle with addition and "had to help her," but that she did not think that anything about her relationship with her daughter or the daughter's cocaine problem would affect her ability to be fair and impartial in Collins' case.

After the prosecutor exercised another peremptory challenge to excuse Juror 019, defense counsel made a motion pursuant to *People v. Wheeler*, 22 Cal. 3d 258,[5] alleging that

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4. When asked to provide her children's occupations, Juror 019 stated that "[t]he oldest one is a computer manager for a company in Van Nuys. Another one is a clinical social worker, works for herself now. One son has his own mechanic shop; one does not work. The other one is in Arizona working for McDonnell Douglas. The youngest is at home with five kids."

5. *Wheeler* is the "California analogue" to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 n.5 (9th Cir. 2003). Although aspects of *Wheeler* differ from *Batson*, notably the requirements for establishing a prima facie case of discrimination, *see Copperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001), the state trial court's finding that Collins established a prima facie case is not in dispute. Because the relevant aspects of the two cases are the same, and because we are reviewing Collins' petition for a writ of habeas corpus under 28 U.S.C. § 2254, we refer to *Batson* in

the prosecutor had improperly dismissed Jurors 016 and 019 on the basis of race. The trial court determined that Collins had established a prima facie case of racial discrimination and thus asked the prosecutor to justify her peremptory challenges. The prosecutor responded:

> Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant of this type of case. Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. She and Mr. 006 were both single, no ties.
>
> [Defense Counsel]: Who is 006?
>
> [Prosecutor]: He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

The judge, outside the presence of the prospective jurors, asked the prosecutor if she had any additional justifications to offer for striking the two African-American female jurors. The following colloquoy took place.

> [Prosecutor]: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is

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analyzing his claims.

a male and there is a male African-American on the jury that has been on it since the beginning, I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of African-American color, black color, on the jury, still seated. That is it, your honor, at this point. Does the court need cases for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area?

The Court: I'll let you know. [Defense counsel], would you like to be heard?

[Defense counsel]: Yes. [Prosecutor] has talked about looking for more male/female balance. I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [Prosecutor] has compared Ms. 016 to Mr. 006, who she excused by saying they are both young and she didn't feel she was getting enough information. If she wanted more information, she could have asked the court to ask more questions of Ms. 019 . . . .

[Prosecutor]: I don't have exact citations here for the court, but *People v. Ortega*, which also talks about the jury being balanced between young and old and men and women.

. . .

The Court: I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see, [Prosecutor], that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is

going to cut it.

[Prosecutor]: I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

After considering these arguments, the court denied the *Wheeler* motion. With regard to Juror 019, the court stated that it was "satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 109's experience with a family member who had a drug problem." As to Juror 016, the court stated that it, "frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney. However, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016."

After sentencing, Collins appealed his conviction and properly exhausted his remedies in both the California Court of Appeal and the California Supreme Court. Collins challenged the trial court's denial of his *Wheeler* motion only with respect to Juror 016. On November 19, 1998, Collins filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. Ultimately, the district court dismissed his petition. Noting that the trial court had not observed Juror 016's demeanor, the district court concluded that it had to respect the trial court's decision to give the prosecutor the benefit of the doubt because Collins had not rebutted this decision with "clear and convincing evidence." The district court subsequently granted Collins' request for a certificate of appealability as to "[w]hether the petitioner's rights were violated under *Batson v.*

Kentucky . . .where the prosecution exercised a peremptory challenge against an African-American juror ostensibly on the ground of the juror's age and demeanor."

I.

Because the California Supreme Court denied Collins' petition for review without comment, our analysis begins with the decision of the California Court of Appeal, an unpublished disposition. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1077, 1079 n.2 (9th Cir. 2000). In affirming the trial court's ruling, the state appellate court adopted the reasons cited by the trial court; thus, our analysis "will necessarily include discussion of the trial court's decision as well." *Lewis*, 321 F.3d at 829.

The California Court of Appeal determined that "because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective [J]uror [N]o. 016 based solely on her age." Citing both *Wheeler* and *Batson*, the state appellate court further rejected Collins' contention that age was an improper basis upon which to justify a peremptory challenge, noting that age groups are not a cognizable class and that peremptory challenges to "youthful and/or immature prospective jurors repeatedly have been upheld as proper." Even assuming that the prosecutor's reliance on Juror 016's young age was improper, the appellate court alternatively concluded that the trial court had engaged in a sincere and reasoned attempt to evaluate the prosecutor's justification, as "[j]urors may be excused on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." Noting that "nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective [J]uror [N]o. 016's demeanor, indicates that the trial court did not approach its task appropriately," the appellate court determined

that the trial court's decision was entitled to deference.

We review Collins' petition according to the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), as Collins filed his petition after April 24, 1996. We may only reverse a judgment of the state that was adjudicated on the merits if the state's decision was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1041 (2003), or if the state court's decision was "contrary to, or involve[s] an unreasonable application of, clearly established Federal law" as determined by "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," *Andrade*, 123 S. Ct. at 1172 (citations omitted). We further note that the ultimate determination of whether the prosecutor evidenced an intent to discriminate in dismissing Juror 016 is a question of fact, *see Hernandez v. New York*, 500 U.S. 352, 367 (1991), and that under section 2254, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Collins therefore must prove that the state court's decision was "'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S.Ct. at 1045.

II.

[1] The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson*, 476 U.S. at 89. Where a defendant asserts that a prosecutor's peremptory challenges were racially-motivated, a court must apply a three-step process for evaluating a *Batson* claim. *Hernandez*, 500 U.S. at 358-60. First, the defendant must make

a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id.*[6] Once a prima facie case is established, the burden shifts to the state to articulate a race-neutral explanation for the challenge. If the first two steps are satisfied, the court must then determine whether the defendant has carried his ultimate burden of proving purposeful discrimination.

A.

[2] Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation –an explanation "based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curia). In assessing the race-neutrality of the prosecutor's explanation, we "must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359. At this step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Stubby v. Gomez*, 189 F.3d 1099, 1105 (9th Cir. 1999) (internal quotation marks omitted). Although the prosecutor must give a "'clear and reasonably specific' explanation of his 'legitimate' reasons' and "the reason must be 'related to the particular case to be tried,'" *Purkett*, 514 U.S. at 768-69 (quoting *Batson*, 476 U.S. at 98 & n.20), "it is not until the *third* step that the

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6. We need not address the preliminary issue of whether Collins made a prima facie showing because the trial court ruled on the ultimate question of intentional discrimination under steps two and three of the *Batson* analysis. *Hernandez*, 500 U.S. at 359; *United States v. Killam*, 167 F.3d 1273, 1278 (9th Cir. 1999).

persuasiveness of the justifications becomes relevant." *Id.* at 768. For the purposes of step 2, the prosecutor's explanation need not be "persuasive, or even plausible." *Id.*

The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be "too tolerant for this type of case," (2) her demeanor, (3) her marital status–"single" with "no ties," (4) her lack of ties to the community, and (5) her gender.[7] The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The California Court of Appeal concluded that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral.

[3] Although Collins concedes that the prosecutor's explanations for striking Juror 016 "may appear to be race-neutral on their face," citing *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992), he contends that rolling of the eyes, lack of ties in the community, and youthful age are not characteristics that would affect a juror's approach to a specific trial and therefore the prosecutor's explanations were "transparent proxies for racism." However, as Collins acknowledges, "[at this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation," *Hernandez*, 500 U.S. 360 (emphasis added), and, unlike the justifications offered in *Bishop*, 959 F.2d at 825, youthful age and the demeanor in question are not characteristics peculiar to a given race or "group-based presupposition applicable in all criminal trials" to African-American jurors. *Id.*

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7. As evidence that she did not dismiss Jurors 016 and 019 because their race, the prosecutor also noted that an African-American man and "a female juror that is of African-American color, black color" remained on the panel.

[4] Further, neither the Supreme Court nor any circuit has held that the Equal Protection Clause prohibits a prosecutor from striking potential jurors on account of age. *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993). Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 is not contrary to, or an unreasonable application of, clearly establish law. Alternatively, if the prosecutor had excluded Juror 016 because of her demeanor, this justification would not constitute a denial of equal protection, as discriminatory intent is not inherent in the prosecutor's explanation. *Hernandez*, 500 U.S. at 360. Because we find no error in the California Court of Appeal's analysis at step 2, we proceed to step 3.

B.

In the third step of a *Batson* challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98, and therefore must evaluate the "persuasiveness" of the prosecutor's proffered reasons, *see Purkett* , 514 U.S. at 768. In determining whether the defendant has carried this burden, the Supreme Court provides that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Hernandez*, 500 U.S. at 363. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination ." *Purkett* , 514 U.S. at 768; *see also Lewis*, 321 F.3d at 830 ("[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.")

In the end, a finding of discriminatory intent turns largely

on the trial court's evaluation of the prosecutor's credibility, *see Batson*, 476 U.S. at 98 n.21, because "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis," *Hernandez*, 500 U.S. at 367. Indeed, "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040. Although we afford great deference to the trial court's observations of the prosecutor's demeanor and intent, "[d]eference does not by definition preclude relief." *Id.* at 1041; *see also Lewis*, 321 F.3d at 821 ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge.") *United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989) (holding that although reasons given by prosecutor "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (noting that courts are not required to accept neutral reasons that are either unsupported by the record or are refuted by it).

In assessing the prosecutor's proffered justifications for excluding Juror 016, the state trial and appellate courts made unreasonable factual determinations in light of the evidence presented in the state court proceeding and unreasonably applied clearly established federal law as determined by the Supreme Court. With a careful eye towards "such circumstantial and direct evidence of intent as [was] available" to the appellate court, *Batson*, 476 U.S. at 93 (internal quotation marks omitted), we address each of the justifications relied

upon by the California courts.

1. Age

The state court of appeal determined that the prosecutor had dismissed Juror 016 solely on the basis of her age. The court explained that because youth was not a cognizable class for purposes of the cross-section rule and because youth had been recognized as a permissible justification for dismissal in the past, Collins had failed to demonstrate purposeful discrimination. However, the appellate court's conclusion is troubling in several respects.

[5] First, although age has been upheld as a proper basis for excusing a potential juror, *see Pichay*, 986 F.2d at 1259, here, the prosecution explained that Juror 016's youthful age might make her "too tolerant for this type of case." Thus, the prosecutor attempted to equate her youthful age with a possible bias favoring criminal defendants facing drug charges. The prosecutor also later explained that Juror 016's youthful age was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and 019]; that was one factor that I considered, that is, the manner in which I stated that they could --that their youth was important."

[6] According to the Supreme Court, Juror 016's age must be "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and must have some relevance to Juror 016's "possible approach to a specific trial," *Bishop*, 959 F.2d at 825. Indeed, although the prosecutor claimed that Juror 016's youthful age was of concern, she later explained that it was *not* the general presence of young jurors on the jury that concerned her. Rather, in referring to Jurors 016 and 019, the prosecutor stated "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Thus, in

explaining that she was not trying to exclude all young jurors from the jury, the prosecutor clarified that her reason for excluding Juror 016 was not her youthful age at all. Instead, her reason for excluding Juror 016 related to particular characteristics that the prosecutor associated with her youth–namely, the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community.[8]

The state court of appeal, however, glossed over the prosecutor's clarification and found that the sole basis upon which the trial court had permitted the prosecutor to exclude Juror 016 was her age. It concluded that because the exclusion of jurors on the basis of their age did not violate the Fourteenth Amendment, Collins had failed to meet his burden of proving purposeful discrimination. However, the state appellate court's

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8. The fact that the trial court acknowledged that Juror 016 "was a youthful person, as was 006[,a]nd one or more other prospective jurors also,"is of no moment. Although the trial court seemed to credit the prosecutor's proffered youthful age justification by a cross-racial comparison of youthful jurors who were excused (the record implies that Juror 006 was not member of a racial minority), the court ignored the prosecutor's clarification that she did not strike Juror 016 because of her "youth," but rather because Juror 016 may have been "too tolerant for this type of case."

We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 "was a youthful person, as was 006." Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to establish just how old Juror 016 might have been.

characterization of the prosecutor's reason for striking Juror 016 was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Indeed, the evidence in the trial record is clear and convincing that the prosecutor's proffered justifications for striking Juror 016 on the basis of her youthful age–possible tolerance of drug use and lack of ties to the community–were pretexts for purposeful discrimination.

With regard to Juror 016's possible tolerance,[9] during voir dire, Juror 016 answered "yes" to the court's question regarding whether she believed that possession of cocaine should be against the law, and she also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on Collins' case. There is no other evidence in the record that remotely suggests that Juror 016 was otherwise sympathetic to or tolerant of individuals involved with drug use or possession. Juror 016 told the court that neither she nor her family members or any of her close friends had ever had a problem with drugs or alcohol; nor had they ever been accused of committing a crime involving illegal drugs. No other information regarding drug use, drug laws, or criminal enforcement of drug laws was solicited by the court or counsel, and Juror 016 never gave the court any information regarding her age. The prosecutor's clarification that Juror 016 might be "too tolerant for this type of case" as a basis for striking Juror 016 is therefore contrary to the evidence in the record. *See Purkett* , 514 U.S. at 768 ("[I]mplausible or fantastic justifications may (and probably will) be found to be

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9. Although the fact that Juror 016's purported tolerance "corresponds to a valid for-cause challenge [helped] demonstrate its race-neutral character" at step 2, *Hernandez*, 500 U.S. at 363, the fact that nothing in the record supports the prosecutor's claim erodes the credibility of her explanation at step 3.

pretexts for purposeful discrimination."); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (rejecting prosecutor's attempt to attribute to challenged juror "beliefs that she did not hold" about "mistrust[-ing] the system," where juror never made such a statement and indicated to the court that she did believe her son had been treated fairly by "the system").

The prosecutor later attempted to explain that Juror 016 was "single, no ties," presumably indicating that she was not married and possibly had no children. However, as we have already explained, *Batson* is clear that the prosecutor's proffered justifications must be reasonably "related to the particular case to be tried." 476 U.S. at 98; *see also Bishop*, 959 F.2d at 825 (stating that a prosecutor's reason for dismissing a potential juror must have some nexus to her "possible approach to specific trial"). The trial court record fails to establish how Juror 016's marital or parental status would have had any bearing on her ability to serve as a juror in a case involving prosecution for crack cocaine possession, and the prosecutor failed to offer any such explanation. Further, the record shows that the prosecutor did not strike Juror 015, a white juror who possessed the same objective characteristics as Juror 016: both were single, employed females with no children who responded to the court's questions in the same manner, thereby revealing the pretextual nature of this justification.[10] *See United States v. Alanis*, 335 F.3d 965, 969

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10. The prosecutor attempted to prove the race-neutral character of this justification by comparing Juror 016 with Juror 006, a white male, noting "[s]he and Mr. 006 were both single, no ties," *See Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."). The record reveals, however, that Jurors 016 and 006 had very different backgrounds and thus did not possess

(9th Cir. 2003) ("Peremptory challenges cannot be lawfully exercised against potential jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged."); *Lewis*, 321 F.3d at 832-33 ("[A] comparative analysis of D.F. with empaneled jurors reveals that a finding of pretext was warranted."); *McClain*, 217 F.3d at 1221-22 (holding that where a non-black juror with no prior jury experience was empaneled, the proffered reason for striking a black juror for lack of jury experience was not

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"comparable characteristics" for purposes of the cross-racial analysis discussed in *Turner*, Juror 006, like Juror 016 was single, but, in contrast to Juror 016, Juror 006 had never been employed and, significantly, had an uncle who was a recovered alcoholic. This evidence is inconsistent with the prosecutor's assertion that there was a white juror with comparable characteristics who was dismissed for being single with no children. *Compare Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994) (holding that counsel may treat minority and nonminority jurors differently when there are subjective differences between them, although that party cannot insulate an explanation from appellate review simply by couching it in "vague and subjective terms") *with Turner*, 121 F.3d at 1251-52 (perceiving no basis to distinguish a challenged and unchallenged juror and holding that their similarity provided evidence of pretext); *cf. United States v. Lewis*, 837 F.2d 415, 417 & n.5 (9th Cir. 1988) (concluding that there was no evidence of pretext when the decision to strike the juror turned on "the interplay of various factors" identified by the prosecutor and "no unchallenged juror possessed all the cited characteristics").

We further note that, contrary to the suggestion made by the dissent, because Jurors 006 and 016 did not possess comparable characteristics, the comparison between the two did not provide a potential reason for the trial court to conclude that the prosecutor was credible.

genuine and therefore was pretextual); *cf. Miller-El*, 537 U.S. 322, 123 S. Ct. at 1043 (noting the fact that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" showed that the strikes "might have been selective and based on racial considerations").

[7] The prosecutor also claimed that Juror 016's youth was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and Juror 019]; that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important." Not only is the prosecutor's statement that Juror 016 had a "lack of ties in the community" not sufficiently "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, but it is also not supported by the record and does not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. *See id.* at 88 (holding that the prosecutor's exercise of peremptory challenges must be "related to his view concerning the outcome") (internal quotation marks omitted); *McClain*, 217 F.3d at 1223 (stating that where the prosecutor did not explain the significance of a juror's body language, the prosecutor's claim that he struck that juror "on the sole basis that she had her elbow on the chair is patently frivolous," especially where no other evidence in the record indicated any possible bias).

[8] In sum, there was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age. This evidence supports Collins' claim that the prosecutor struck Juror 016 because of her race, and also demonstrates that the state appellate court was unreasonable when it determined that

the trial court did not err by determining that Collins had failed to prove purposeful discrimination. However, because the appellate court offered Juror 016's demeanor as an alternative explanation, we must assess whether the court unreasonably determined that the trial court had properly accepted that justification as nondiscriminatory before determining the ultimate significance of the appellate court's conclusion regarding Juror 016's age.

2. Demeanor

The state court of appeal also concluded that even if the prosecutor's reliance on Juror 016's youthful age had been improper, the "prosecutor reasonably could have interpreted prospective [Juror 016's] body language as indicative of hostility or disrespect" and properly dismissed her on that basis. Although the trial court did not witness Juror 016's alleged offensive conduct, the appellate court determined there was "*nothing* in the present record" indicating that the trial court should not have given the prosecutor the benefit of the doubt or that it had failed to evaluate whether the prosecutors' justifications should have been accepted.

As the record reflects, the state appellate court reasonably determined that the trial court had not observed Juror 016's demeanor but nonetheless accepted this alternate reason for striking Juror 016 on the basis of the prosecutor's credibility. Because the trial court did not observe Juror 016's demeanor, the critical question here is whether the appellate court's determination that the trial court properly credited the prosecutor's representation was unreasonable.[11/] Notably, the

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11. In response to the prosecutor's characterization of Juror 016's alleged conduct, the trial court responded: "the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney." In light of the trial court's statement and the fact that there is nothing in the trial

basis for the state appellate court's determination was its conclusion that there was "nothing in the present record" to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility. We conclude that this determination was unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking Juror 016.

First, we note that the prosecutor consistently identified Jurors 016 and 019 as "both young."[12/] However, the record

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transcript (except the prosecutor's representation) which indicates that Juror 016 answered any question by stating "uh-huh" or that she had rolled her eyes or turned away, the appellate court reasonably determined that the trial court had accepted the prosecutor's statements about Juror 016's demeanor as true. Its corresponding conclusion–that a peremptory challenge exercised on the basis of a juror's body language would not be improper–was also reasonable. *See Burks*, 27 F.3d at 1429 & n.3 (noting that trial counsel's evaluation of a potential juror's demeanor, tone, and facial expressions may lead to a "hunch" or "suspicion" that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate); *United States v. Power*, 881 F.2d 733, 740v (9th Cir. 1989) (accepting as legitimate the government's explanation that a juror's "fidgeting and looking around as he sat in the jury box . . . made the prosecutor believe that the individual would not be an attentive juror").

12. Although Collins does not challenge the prosecutor's strike against Juror 019, this strike is relevant to Collins' *Batson* challenge because the prosecutor labeled Juror 019 "young" even though Juror 019 was a grandmother. *See Hernandez*, 500 U.S. at 363 (holding that a prosecutor's motive "may often be inferred from the totality of relevant facts")

reveals that Juror 019 was at least a middle-aged grandmother. Indeed, Juror 019 informed the court that she was a retired nurse with seven grown children, the youngest of which had five children of her own. A prosecutor supplied with this information could not credibly identify Juror 019 as young. This incorrect factual statement supports Collins' argument that the prosecutor was not credible. *See McCain*, 217 F.3d at 1222 (holding that reasons for excusing black jurors that were objectively contradicted by the record provided evidence of purposeful discrimination); *Caldwell v. Mahoney*, 159 F.3d 639, 651 (1st Cir. 1998) (holding that serious questions of pretext arise when the facts in the record are "objectively contrary to" the prosecutor's proffered justifications).

In addition, the trial court judge rejected the prosecutor's justification for striking Jurors 016 and 019 on the basis of gender. This too supports the argument that the prosecutor dismissed Juror 016 on the basis of her race.[13] *See Lewis*, 321

(internal quotation marks omitted); *Purkett*, 514 U.S. at 768-69 (holding that at step three, the trial court must evaluate the persuasiveness of the prosecutor's justification); *Batson*, 476 U.S. at 98 (holding that the trial court must decide whether the prosecutor's explanation for the strike is pretextual); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (noting that the trial court "has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances:).

13. In rejecting the prosecutor's initial references to gender, the trial court explained: "I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see . . . that you are seeking to justify excusing people of one ethnicity based on their gender.

F.3d at 834 (stating that the fact that the trial court had found some of the prosecutor's arguments unconvincing "does not support the prosecutor's credibility; it undermines it"). Further, the fact that the prosecutor attempted to offer a facially discriminatory justification for dismissing the only black female jurors in the venire, and then quickly abandoned this justification when informed by the trial judge that it was improper, is another indication that the prosecutor's stated justifications were a pretext for discrimination. *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040 ("Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are.").

The prosecutor's objectively unreasonable statements regarding Juror 019's age, and her attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019, combined with her pretextual justifications for dismissing Juror 016 on the basis of her alleged lack of community ties, her marital status, and her purported tolerance, and the fact that nothing in the record corroborated her allegations regarding Juror 016's demeanor, provide "clear and convincing evidence" that the prosecutor did not dismiss Juror 016 on the basis of her demeanor. In light of the evidence in the record, the appellate court's determination that the prosecutor dismissed Juror 016 because of her demeanor was an unreasonable determination of the facts. Because this determination provided the basis for the appellate court's conclusion that the trial court had not clearly erred in accepting the prosecutor's justification as race-neutral, this determination also was objectively unreasonable, *See Johnson*, 3F.3d at 1331 ("When there is reason to believe that there is a racial motivation for the challenge" we are not "bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it."); *Lewis*, 321 F.3d at 833-34 (holding that where justification for strike was not

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I don't think that is going to cut it."

corroborated by the record and the prosecutor was not credible, the proffered justification could not support state court's conclusion that petitioner had failed to prove purposeful discrimination).

C.

The state court of appeal held that Collins had failed to establish purposeful discrimination on the basis of its objectively unreasonable determination that the prosecutor properly dismissed Juror 016 because of her age. The appellate court's alternative ruling–that the trial court properly credited the prosecutor's assertion that Juror 016 had rolled her eyes and turned away from the court when asked a question during voir dire, and that her dismissal based on Juror 016's demeanor did not proved any evidence of purposeful discrimination–is also unsupported by the record. Thus, clear and convincing evidence demonstrates that there was no credible basis for dismissing Juror 016 on the basis of her age of demeanor.

[9] there is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while her justifications for dismissing Juror 019 were contrary to the record (age) and patently pretextual (daughter's former drug problem). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on

the basis of her race.[14]

In order to secure habeas relief, however, Collins "must demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1045. We conclude that Collins has met this heavy burden.

1.

[10] The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justification that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins' claim of pretext, however, is supported by the record–the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the

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14. The fact that a black man and "a female juror that [was] of African-American color, black color" remained in the venire does not alter our conclusion. *See Turner*, 121 F.3d at 1254 ("[A]lthough the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive, [] it is not dispositive."); *Palmer v. Estelle* but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*.")

prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record . . . indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).[15]

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15. Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court *can disagree* with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 123 S. Ct. at 1041; *see also Hall v. Dir. of Corrs*, 343 F.3d 976, 984 n.8 (9th Cir. 2003) ("AEDPA, although emphasizing proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye.") Critical to our analysis are the ten different reasons offered by the prosecutor for dismissing Jurors 016 and 019. As our analysis reflects, one of the reasons was facially discriminatory, two reasons were contradicted by the record, one reason was not applied to a comparably similar juror who was not struck, and four reasons were without any support in the record.

2.

Further, although the appellate court identified the three-step inquiry for identifying purposeful discrimination under *Batson*, it unreasonably applied *Batson*'s third prong in determining that the trial court had fulfilled its *duty* to determine whether Collins had established purposeful discrimination. *See Andrade*, 123 S. Ct. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). It is well-established that "once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, the trial court then has the *duty to determine if the defendant has established purposeful discrimination."* Hernandez, 500 U.S. at 363 (emphasis added) (internal quotation marks omitted); *id.* at 359 (holding that the "trial court *must* determined whether the defendant has carried his burden of proving purposeful discrimination") (emphasis added); *Batson*, 476 U.S. at 98 ("The trial court will then have the *duty* to determine if the defendant has established purposeful discrimination.") (emphasis added). As the Supreme Court has emphasized, "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and must evaluate the "genuineness of the [prosecutor's] motive," *Purkett* , 514 U.S. at 769. Thus, a state appellate court's decision that overlooked a trial court's failure to evaluate the persuasiveness of the prosecutor's justifications in conducting this inquiry would rest on an unreasonable application of well-established Supreme Court precedent. *See Lewis*, 321 F.3d at 832 ("Unlike the trial court, a court of appeal is not in an ideal position to conduct a step three evaluation. It can, however, use the trial court's findings and the evidence on the record to evaluate the support on the record for the prosecutor's reasons and credibility, and to compare the struck and empaneled jurors.")

Here, the appellate court's determination that "nothing in the present record" indicated that the trial court failed to evaluate the prosecutor's credibility must have been based either (1) upon a conclusion that there was no evidence that undermined her credibility or (2) upon a belief that the record demonstrated that the trial court had assessed any such evidence in evaluating the persuasiveness of the prosecutor's justification. The record belies either conclusion.

[11] As we have discussed, the prosecutor's attempt to justify her challenge of Juror 016 on the basis of her age, specifically on account of her marital status, her alleged lack of community ties, and her purported tolerance, was unsupported by the record. In addition, the prosecutor's attempt to justify her strike of Juror 019 on the basis of her youthful age was contradicted by the record. The trial court acknowledged that it had not observed Juror 016's alleged demeanor, and nothing in the record corroborates the prosecutor's allegations. It also rejected the prosecutor's justifications relating to gender as clearly violative of the Fourteenth Amendment. Thus, contrary to the appellate court's assessment of the record, the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016. The appellate court's contrary determination demonstrates that, although it recognized the trial court's duty under *Batson* to determine whether Collins had show purposeful discrimination, it unreasonably applied that principle in concluding that the trial court had done so.

IV.

[12] Because the basis for the appellate court's decision was its unreasonable determination of the facts in light of the evidence presented at the trial, and because it also unreasonably applied clearly established federal law as determined by the

Supreme Court, we conclude that the state trial appellate court committed constitutional error that warrants the grant of a writ of habeas corpus under section 2254. We therefore reverse the district court's judgment and remand with instructions to grant the petition on conditions it deems appropriate.[16]

REVERSED and REMANDED.

HALL, Circuit Judges, dissenting:

The state trial court determined that the prosecutor's proffered race-neutral justifications for striking Juror 016 were credible. This conclusion is entitled to "great deference," *Hernandez v. New York*, 500 U.S. 352, 364 (1991), and may not be disturbed on appeal unless clearly erroneous. *Id.* at 369; *see also Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003) (reasoning that because an appellate court has access only to the trial transcript, it is "not as well positioned as the trial court is to make credibility determinations."). Applying this deferential standard, the California Court of Appeal found that the trial court did not err. Because this case is governed by AEDPA, we must defer to the California Court of Appeal's conclusion unless contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or premised on an unreasonable factual finding. 28 U.S.C. § 2254(d).

The majority does not defer to the California Court of Appeal. According to the majority, deference is unwarranted because the Court of Appeal's decision rests upon the "unreasonable factual determination" that "there was 'nothing in the present record' to indicated that the trial court did not

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16. In light of our disposition, we need not address Collins' 8th Amendment argument that his three strikes sentence was cruel and unusual. *But see Andrade*, 123 S. Ct. 1166.

conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility." In point of fact, the Court of Appeal held only that the trial court's *ultimate* decision to credit the prosecutor was not clearly erroneous, thereby adhering to the well-established principle that "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369.

Having manufactured a reason to disregard the California Court of Appeal's decision, the majority essentially reviews the issue of the prosecutor's credibility *de novo*, concluding that the writ should issue because, under the majority's view, "the record belies" the conclusion that the trial court assessed evidence which ostensibly undermined the prosecutor's credibility. In doing do, the majority disregards the canonical rule that evaluation of a prosecutor's credibility "lies peculiarly within a trial judge's province," and is entitled to "great deference." *Id.* at 366[1]

Viewing the record in its entirety, I am firmly convinced that the California Court of Appeal's decision was reasonable. I respectfully dissent.

* * * *

The majority identifies four consideration potentially relevant to the prosecutor's credibility. In order to reject the

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1. Contrary to the majority's view, the state appellate court has no duty to make its own purposeful discrimination determination. Indeed, this would beyond the scope of the state appellate court's review. In the *Batson* context, a state appellate court's duty is limited to determining whether the *trial court's* purposeful discrimination finding was *clearly erroneous*. *E.g.*, *Hernandez*, 500 U.S. at 366-67.

California Court of Appeal's decision, we would have to conclude that the Court of Appeal *unreasonably* determined that, given these four considerations, the trial court did not *clearly err* by crediting the prosecutor's race-neutral explanation. As the following discussion illustrates, the majority falls far short of making this requisite demonstration.

The majority argues that the trial court should have questioned the prosecutor's credibility because she referred to *another* prospective juror, Juror 019, as "young" even though Juror 019 was a grandmother of five. As the majority suggests, the prosecutor may have either been entirely incapable of judging a person's age or may have intentionally misrepresented Juror 019's age to the court. A fair more plausible explanation, on the other hand, is that the reference to Juror 019 as "young" was purely accidental. The statement at issue occurred during a discussion about Juror 016, Juror 019, and Juror 006, a young ,single white male against whom the prosecutor also exercised a peremptory strike. Because Jurors 016 and 019 were the subject of the *Batson* challenge, both jurors were repeatedly referred to in tandem. Similarly, Jurors 016 and 0066 were referred to together several times by the prosecutor, who argued that the two young, single jurors were similarly situated. In this context, it is not surprising that the prosecutor would, on one occasion, flip the designations "006" and "019." Indeed, defense counsel also seemed confused about the numerical designations, once mistakenly referring to Juror 016 as "Ms. 019."[2] Both the trial judge and defense counsel clearly indicated that they

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2. After noting that one of the prosecutor's justifications for striking *Juror 016* was a lack of information, defense counsel argued, "if [the prosecutor] wanted more information, she could have asked the court to ask more questions of *Ms. 019*."

understood the prosecutor's justification for striking Juror 019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant.[3] Under these circumstances, the majority's focus on the prosecutor's misstatement,[4] an issue that was not briefed by the parties, is nothing short of absurd.

The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral justifications, including Juror 016 demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications offered by that prosecutor.[5] In the instant case, the trial judge

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3. Summarizing the prosecution's argument, defense counsel stated: "[The prosecutor] has compared Ms. 016 to Mr. 006, which she excused by saying they were both young. . . . And Ms. 019, certainly, indeed, said that she had . . . one daughter which she said a cocaine problem and that she had been involved with treatment for the daughter."

4. Indeed, the prosecutor's "incorrect factual statement" is the majority's lead argument in support of its conclusion that the trial court clearly erred in considering the prosecutor to be credible.

5. The majority quotes this court's decision in *Johnson v. Vasquez*, 3F.3d 1327 (9th Cir. 1993), for the proposition that "'[w]hen there is reason to believe that there is a racial

rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights

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motivation of the challenge,' we are not 'bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.'" *Id.* at 1331. This reference is misleading, however, First of all, the *Johnson* court was confronted with a case in which the prosecutor's own statements "strongly suggest[ed] that [he] responded to defense counsel's alleged exclusions of other minority venire members by excluding a member of defendant's race." *Id.* at 1330. Hence, this court's admonition that "when there is reason to believe that there is a racial motivation for the challenge . . . we are not bound" was a direct reference to the prosecutor's tacit admission that he was excluding members of the venire based on their ethnicity, an integral element of the *Johnson* decision which is not present in the instant case.

Second, the majority omits crucial language from the *Johnson* decision which bears on its relevance to the case at bar. Specifically, we noted that "*neither the trial courts nor we* are bound to accept" the prosecutor's ostensibly neutral rationales at face value. *Id.* at 1331 (emphasis added). Viewed in context, the language from our *Johnson* decision clarifies the majority's fundamental mistake in this case. Once the trial court decides to "accept at face value" a "list of neutral reasons" proffered by the prosecutor, we are bound by precedent to grant that decision "great deference." *Hernandez*, 500 U.S. at 366

Finally, even if the language from *Johnson* were pertinent to the instant case, it nonetheless fails to dispute the point that, even if a trial or appellate court chose not to accept *one* (or more) of the prosecutor's articulated justifications, they would not thereby be compelled to reject *all* of the proffered rationales.

nothing in the record to indicate that the California Court of Appeal should have deemed this decision *clearly erroneous*.

The third credibility issue raised by the majority also relates to Juror 019 rather than Juror 016. Making an argument not presented by Collins either before this court or before the California Court of Appeal, the majority contends that the prosecution's explanation that Juror 019 had a daughter recently treated for cocaine addition was pretextual because a white juror passed by the prosecution, Juror 030, also had a child with a cocaine problem. There are several fundamental problems with the majority's analysis of this issue. The issue was not briefed by the parties or discussed at oral argument, and the record itself certainly does not contain clear and convincing evidence that Juror 019 and Juror 030 were, as the majority terms them, "indistinguishably similar."[6] Moreover, even if one accepts the majority's shaky premise that Jurors 019 and 030 were

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6. For example, Juror 019's daughter's cocaine problem were more recent (two years) than was Juror 030's son's problem (six years). There may also have been significant differences in the demeanor of each prospective juror that are not evident from the trial transcript.

By way of contrast, compare the majority's conclusion that Juror 019 and 030 are indistinguishable to its own discussion of the dissimilarity of Jurors 006 and 016, which is relegated to a footnote. In support of its claim that the prosecutor's alleged rationales for dismissing Juror 016 (her marital status and lack of community ties) were pretextual, even though Juror 006 was also dismissed on the same grounds, the majority summarily concludes that "[t]he record reveals . . . that Jurors 006 and 016 had very different backgrounds and thus did not possess 'comparable characteristics,'" even though Jurors 006 and 016 "were both single, no ties."

"indistinguishably similar," there is no Supreme Court precedent indicating that a race-neutral justification is necessarily pretextually merely because it applies to another member of the venire. Similarly, there is a complete dearth of Supreme Court precedent indicating that a trial judge may not credit a prosecutor's race-neutral justification if there is reason to believe that the race-neutral justification given for *another* juror was pretextual. For these reasons, the prosecutor's conduct vis-avis Juror 019 lends very little, if any, support to the majority's conclusion that the trial judge should have questioned the prosecutor's explanation for striking Juror 016.

Finally, the majority contends that the prosecutor's explanation that Juror 016 was a youthful single person, and therefore potentially too tolerant, was not credible. Noting that Juror 016 "believed possession of crack cocaine should be illegal," the majority concludes that the prosecutor's concern that Juror 016 might be too tolerant for this three strikes case was "patently frivolous." The majority's conclusion is simply untenable — the theory that young persons, even those who believe crack cocaine should be illegal and don't expressly indicate any heightened tolerance for drug offenders, may be less willing to impose harsh sentences for drug possession than their older counterparts in the venire can hardly be considered unreasonable, much less "implausible or fantastic."

Indeed, the majority's own analysis demonstrates precisely why the Court of Appeal properly deferred to the trial court's judgment. The majority strains to find that the credibility issues discussed above constitute "clear and convincing" evidence which not only undermines the prosecutor's credibility, but makes clear that the prosecutor's articulated rationales for her peremptories were "wholly implausible." Viewing the majority's credibility argument

generously, however, their conclusion is merely that the trial court had several potential reasons to question the prosecutor's credibility. Presumably, the trial court also had a variety of potential reasons to believe that the prosecutor *was* credible, including the prosecutor's ostensibly truthful comparison between Juror 016 and Juror 006. Significantly, the trial judge also had the ability to observe the prosecutor's demeanor to determine whether she appeared to be telling the truth, evidence which would not be evident in the record. Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications. *See Hernandez*, 500 U.S. at 369 ("Where there are two permissible views of the evidence, the fact-finder's choice between the cannot be clearly erroneous." *See also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (stating that Section 2254 "demands that state court decisions be given the benefit of the doubt").

For the forgoing reasons, I would affirm.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTELL COLLINS,
Petitioner-Appellant,

v.

BERTRAM RICE; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

No. 01-56958

D.C. No.
CV-98-09329-TJH

OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted
June 5, 2003–Pasadena, California

Filed November 7, 2003

Before: Cynthia Holcomb Hall, Sidney R. Thomas, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Hall

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that substantial evidence can support a drug offender's contention that the prosecutor dismissed an African American juror because of her race, where the prosecutor's justifications for dismissing the juror on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in the case (lack of community ties), and were not applied equally to white jurors (single with no children); and where one of the prosecutor's justifications was patently discriminatory (gender), while her justifications for dismissing another African American were contrary to the record (age) and patently pretextual (daughter's former drug problem).

Appellant Steven Collins petitioned for a writ of habeas corpus in district court under 28 U.S.C. § 2254, alleging that race motivated the prosecutor's peremptory strikes against two African-American women, Juror 016 and Juror 019, a middle-aged grandmother, during jury selection prior to his California state court trial for possession of a controlled substance. The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be too tolerant for this type of case, (2) her demeanor, (3) her marital status–Single with no ties, (4) her lack of ties to the community, and (5) her gender. The prosecutor did not strike a white juror who possessed the same objective characteristics as Juror 016. The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's

discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The prosecutor also struck Juror 019, noting her youth and daughter's former drug problem. The jury found Collins guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of 25 years to life in state prison.

The California Court of Appeal affirmed Collins' conviction and sentence, concluding that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral. The California Court of Appeal determined that because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective Juror 016 based solely on her age. However, noting that nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective Juror 016's demeanor, indicated that the trial court did not approach its task appropriately, the appellate court determined that the trial court's decision was entitled to deference. The California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus. The district court denied Collins' federal habeas petition.

Collins appealed.

[5] Although age has been upheld as a proper basis for excusing a potential juror, the prosecutor attempted to equate Juror 016's youthful age with a possible bias favoring criminal defendants facing drug charges. **[6]** According to the Supreme Court, Juror 016's age had to be related to the particular case to be tried. Instead, the prosecutor's reason for excluding Juror 016 related to the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with

drug possession and that she lacked ties to the community. **[7]** Not only was the prosecutor's statement that Juror 016 had a lack of ties in the community not sufficiently clear and reasonably specific, but it was also not supported by the record and did not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. **[8]** There was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age.

[9] There was substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrated that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also showed that one of her justifications was patently discriminatory (gender), while her justifications for dismissing Juror 019 were contrary to the record (age) and patently pretextual (daughter's former drug problem). In sum, the record demonstrated that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

[10] Collins thus showed by clear and convincing evidence that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. **[11]** Contrary to the appellate

court's assessment of the record the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Jurors 016 and 019. The appellate court's contrary determination demonstrated that it unreasonably concluded that the trial court had fulfilled its duty to determine whether Collins had shown purposeful discrimination. **[12]** It had to be concluded that the state trial appellate court committed constitutional error that warranted the grant of a writ of habeas corpus under § 2254. The judgment of the district court had to be reversed.

Judge Hall dissented, writing that both the majority opinion and the record were devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with no permissible alternative but to reject the prosecutor's race-neutral justifications.

COUNSEL

Karen H. Bucur, Laguna Hills, California, argued the case for the appellant.

Erika D. Jackson, Deputy Attorney General, Los Angeles, California, argued the case for the appellees.

OPINION

PAEZ, Circuit Judge:

Steven Collins appeals the district court's order denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. During jury selection prior to his state court trial for

possession of a controlled substance, Collins, an African-American male, alleged that race motivated the prosecutor's peremptory strikes against two African-American women in the jury venire in violation of *People v. Wheeler*,[1] but the state trial court rejected Collins' *Wheeler* motion. The jury found him guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of twenty-five years to life in state prison.[2] The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we conclude that the California Court of Appeal's decision that the prosecutor did not engage in purposeful discrimination during jury selection represents (1) an unreasonable determination of the facts in light of the evidence presented at trial, and (2) an objectively unreasonable application of clearly established law. Accordingly, we reverse with instructions to grant the petition.

BACKGROUND

After Collins was discovered in possession of 0.10 grams of powder cocaine in March 1996, the State of California charged him with possession of a controlled substance in violation of California Health and Safety Code section 11350(a). When jury selection began, the trial court excused ten of the original thirty-three members of the venire.

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1. 22 Cal. 3d 258 (1978).

2. *See* Cal. Penal Code Ann. § 667(e)(2)(A) (West 1999).

Of the remaining twenty-three, three appeared to be African-American.[3]

During voir dire, Juror 016, one of two African-American women in the venire, stated that she lived in Inglewood, California, was single, had no children, no prior jury experience, no prior employment experience in law enforcement; and worked as an automations clerk for the Federal Aviation Administration. She also stated that no one close to her had ever been accused of a drug-related offense, nor had anyone close to her had a problem with alcohol or drugs, and that she had no reason to believe that drug dealers operated in her neighborhood. When asked whether she thought that possession of rock cocaine ought to be against the law, she answered "yes." Juror 016 also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on a case involving drug charges. The prosecutor exercised a peremptory challenge to excuse Juror 016.

Juror 019, the other African-American woman in the venire, told the court that she lived in Inglewood, California, was single with seven grown children,[4] and was currently a

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3. At a later point in the proceeding, the prosecutor argued that there were in fact four African-American jurors in the venire. She identified one female juror as being "of" African-American color, black color," but defense counsel clarified that although she was a "woman of color," this juror was not in fact African-American.

4. When asked to provide her children's occupations, Juror 019 stated that "[t]he oldest one is a computer manager for a company in Van Nuys. Another one is a clinical social worker, works for herself now. One son has his own mechanic shop; one does not work. The other one is in Arizona working

retired nurse. She also stated that she had no relatives or close friends in law enforcement and had never had an experience with a police officer that was "particularly positive or particularly negative." At one time, her youngest daughter had a problem with drugs. Juror 019 had no idea what kind of drugs but thought that it might have been cocaine. Juror 019 stated that she "was involved in" her daughter's struggle with addition and "had to help her," but that she did not think that anything about her relationship with her daughter or the daughter's cocaine problem would affect her ability to be fair and impartial in Collins' case.

After the prosecutor exercised another peremptory challenge to excuse Juror 019, defense counsel made a motion pursuant to *People v. Wheeler*, 22 Cal. 3d 258,[5] alleging that the prosecutor had improperly dismissed Jurors 016 and 019 on the basis of race. The trial court determined that Collins had established a prima facie case of racial discrimination and thus asked the prosecutor to justify her peremptory challenges. The prosecutor responded:

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for McDonnell Douglas. The youngest is at home with five kids."

5. *Wheeler* is the "California analogue" to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 n.5 (9th Cir. 2003). Although aspects of *Wheeler* differ from *Batson*, notably the requirements for establishing a prima facie case of discrimination, *see Copperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001), the state trial court's finding that Collins established a prima facie case is not in dispute. Because the relevant aspects of the two cases are the same, and because we are reviewing Collins' petition for a writ of habeas corpus under 28 U.S.C. § 2254, we refer to *Batson* in analyzing his claims.

Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant of this type of case. Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. She and Mr. 006 were both single, no ties.

[Defense Counsel]: Who is 006?

[Prosecutor]: He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

The judge, outside the presence of the prospective jurors, asked the prosecutor if she had any additional justifications to offer for striking the two African-American female jurors. The following colloquoy took place.

> [Prosecutor]: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is a male and there is a male African-American on the jury that has been on it since the beginning, I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of African-American color, black color, on the jury, still seated. That is it, your honor, at this point. Does the court need cases for those types of reasons

as being upheld in other courts, age and gender and inexperience with a certain subject area?

The Court: I'll let you know. [Defense counsel], would you like to be heard?

[Defense counsel]: Yes. [Prosecutor] has talked about looking for more male/female balance. I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [Prosecutor] has compared Ms. 016 to Mr. 006, who she excused by saying they are both young and she didn't feel she was getting enough information. If she wanted more information, she could have asked the court to ask more questions of Ms. 019 . . . .

[Prosecutor]: I don't have exact citations here for the court, but *People v. Ortega*, which also talks about the jury being balanced between young and old and men and women.

. . .

The Court: I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see, [Prosecutor], that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it.

[Prosecutor]: I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important. It was not that I don't want any young

people on the jury. There are, I believe, other young people on the jury.

After considering these arguments, the court denied the *Wheeler* motion. With regard to Juror 019, the court stated that it was "satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 109's experience with a family member who had a drug problem." As to Juror 016, the court stated that it, "frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney. However, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016."

After sentencing, Collins appealed his conviction and properly exhausted his remedies in both the California Court of Appeal and the California Supreme Court. Collins challenged the trial court's denial of his *Wheeler* motion only with respect to Juror 016. On November 19, 1998, Collins filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. Ultimately, the district court dismissed his petition. Noting that the trial court had not observed Juror 016's demeanor, the district court concluded that it had to respect the trial court's decision to give the prosecutor the benefit of the doubt because Collins had not rebutted this decision with "clear and convincing evidence." The district court subsequently granted Collins' request for a certificate of appealability as to "[w]hether the petitioner's rights were violated under *Batson v. Kentucky* . . .where the prosecution exercised a peremptory challenge against an African-American juror ostensibly on the ground of the juror's age and demeanor."

I.

Because the California Supreme Court denied Collins' petition for review without comment, our analysis begins with the decision of the California Court of Appeal, an unpublished disposition. *See Aalst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1077, 1079 n.2 (9th Cir. 2000). In affirming the trial court's ruling, the state appellate court adopted the reasons cited by the trial court; thus, our analysis "will necessarily include discussion of the trial court's decision as well." *Lewis*, 321 F.3d at 829.

The California Court of Appeal determined that "because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective [J]uror [N]o. 016 based solely on her age." Citing both *Wheeler* and *Batson*, the state appellate court further rejected Collins' contention that age was an improper basis upon which to justify a peremptory challenge, noting that age groups are not a cognizable class and that peremptory challenges to "youthful and/or immature prospective jurors repeatedly have been upheld as proper." Even assuming that the prosecutor's reliance on Juror 016's young age was improper, the appellate court alternatively concluded that the trial court had engaged in a sincere and reasoned attempt to evaluate the prosecutor's justification, as "[j]urors may be excused on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." Noting that "nothing in the pres[illegible]ecord, including the trial court's decision to give the pros[illegible] the benefit of the doubt as to prospective [J]uror [N][illegible] demeanor, indicates that the trial court did not app[illegible]s task appropriately," the appellate court deter[illegible]ed that the trial court's decision was entitled to deference.

We review Collins' petition according to the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), as Collins filed his petition after April 24, 1996. We may only reverse a judgment of the state that was adjudicated on the merits if the state's decision was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1041 (2003), or if the state court's decision was "contrary to, or involve[s] an unreasonable application of, clearly established Federal law" as determined by "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," *Andrade*, 123 S. Ct. at 1172 (citations omitted). We further note that the ultimate determination of whether the prosecutor evidenced an intent to discriminate in dismissing Juror 016 is a question of fact, *see Hernandez v. New York*, 500 U.S. 352, 367 (1991), and that under section 2254, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Collins therefore must prove that the state court's decision was "'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S.Ct. at 1045.

II.

[1] The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson*, 476 U.S. at 89. Where a defendant asserts that a prosecutor's peremptory challenges were racially-motivated, a court must apply a three-step process for evaluating a *Batson* claim. *Hernandez*, 500 U.S. at 358-60. First, the defendant must make a prima facie showing that the

prosecutor exercised a peremptory challenge on the basis of race. *Id.*[6] Once a prima facie case is established, the burden shifts to the state to articulate a race-neutral explanation for the challenge. If the first two steps are satisfied, the court must then determine whether the defendant has carried his ultimate burden of proving purposeful discrimination.

A.

[2] Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation –an explanation "based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curia). In assessing the race-neutrality of the prosecutor's explanation, we "must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359. At this step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Stubby v. Gomez*, 189 F.3d 1099, 1105 (9th Cir. 1999) (internal quotation marks omitted). Although the prosecutor must give a "'clear and reasonably specific' explanation of his 'legitimate' reasons" and "the reason must be 'related to the particular case to be tried,'" *Purkett* , 514 U.S. at 768-69 (quoting *Batson*, 476 U.S. at 98 & n.20), "it is not until the *third* step that the persuasiveness of the

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6. We need not address the preliminary issue of whether Collins made a prima facie showing because the trial court ruled on the ultimate question of intentional discrimination under steps two and three of the *Batson* analysis. *Hernandez*, 500 U.S. at 359; *United States v. Killam*, 167 F.3d 1273, 1278 (9th Cir. 1999).

justifications becomes relevant." *Id.* at 768. For the purposes of step 2, the prosecutor's explanation need not be "persuasive, or even plausible." *Id.*

The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be "too tolerant for this type of case," (2) her demeanor, (3) her marital status–"single" with "no ties," (4) her lack of ties to the community, and (5) her gender.[7] The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The California Court of Appeal concluded that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral.

[3] Although Collins concedes that the prosecutor's explanations for striking Juror 016 "may appear to be race-neutral on their face," citing *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992), he contends that rolling of the eyes, lack of ties in the community, and youthful age are not characteristics that would affect a juror's approach to a specific trial and therefore the prosecutor's explanations were "transparent proxies for racism." However, as Collins acknowledges, "[at this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation," *Hernandez*, 500 U.S. 360 (emphasis added), and, unlike the justifications offered in *Bishop*, 959 F.2d at 825, youthful age and the demeanor in question are not characteristics peculiar to a given race or "group-based presupposition applicable in all

7. As evidence that she did not dismiss Jurors 016 and 019 because their race, the prosecutor also noted that an African-American man and "a female juror that is of African-American color, black color" remained on the panel.

criminal trials" to African-American jurors. *Id.*

[4] Further, neither the Supreme Court nor any circuit has held that the Equal Protection Clause prohibits a prosecutor from striking potential jurors on account of age. *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993). Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 is not contrary to, or an unreasonable application of, clearly establish law. Alternatively, if the prosecutor had excluded Juror 016 because of her demeanor, this justification would not constitute a denial of equal protection, as discriminatory intent is not inherent in the prosecutor's explanation. *Hernandez*, 500 U.S. at 360. Because we find no error in the California Court of Appeal's analysis at step 2, we proceed to step 3.

B.

In the third step of a *Batson* challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98, and therefore must evaluate the "persuasiveness" of the prosecutor's proffered reasons, *see Purkett* , 514 U.S. at 768. In determining whether the defendant has carried this burden, the Supreme Court provides that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Hernandez*, 500 U.S. at 363. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination ." *Purkett* , 514 U.S. at 768; *see also Lewis*, 321 F.3d at 830 ("[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons

may be deemed a pretext for racial discrimination.")

In the end, a finding of discriminatory intent turns largely on the trial court's evaluation of the prosecutor's credibility, *see Batson*, 476 U.S. at 98 n.21, because "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis," *Hernandez*, 500 U.S. at 367. Indeed, "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040. Although we afford great deference to the trial court's observations of the prosecutor's demeanor and intent, "[d]eference does not by definition preclude relief." *Id.* at 1041; *see also Lewis*, 321 F.3d at 821 ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge.") *United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989) (holding that although reasons given by prosecutor "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (noting that courts are not required to accept neutral reasons that are either unsupported by the record or are refuted by it).

In assessing the prosecutor's proffered justifications for excluding Juror 016, the state trial and appellate courts made unreasonable factual determinations in light of the evidence presented in the state court proceeding and unreasonably applied clearly established federal law as determined by the

Supreme Court. With a careful eye towards "such circumstantial and direct evidence of intent as [was] available" to the appellate court, *Batson*, 476 U.S. at 93 (internal quotation marks omitted), we address each of the justifications relied upon by the California courts.

1. Age

The state court of appeal determined that the prosecutor had dismissed Juror 016 solely on the basis of her age. The court explained that because youth was not a cognizable class for purposes of the cross-section rule and because youth had been recognized as a permissible justification for dismissal in the past, Collins had failed to demonstrate purposeful discrimination. However, the appellate court's conclusion is troubling in several respects.

[5] First, although age has been upheld as a proper basis for excusing a potential juror, *see Pichay*, 986 F.2d at 1259, here, the prosecution explained that Juror 016's youthful age might make her "too tolerant for this type of case." Thus, the prosecutor attempted to equate her youthful age with a possible bias favoring criminal defendants facing drug charges. The prosecutor also later explained that Juror 016's youthful age was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and 019]; that was one factor that I considered, that is, the manner in which I stated that they could --that their youth was important."

[6] According to the Supreme Court, Juror 016's age must be "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and must have some relevance to Juror 016's "possible approach to a specific trial," *Bishop*, 959 F.2d at 825. Indeed, although the prosecutor claimed that Juror 016's youthful age was of concern, she later explained that it was *not* the general presence of young jurors on the jury that

concerned her. Rather, in referring to Jurors 016 and 019, the prosecutor stated "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Thus, in explaining that she was not trying to exclude all young jurors from the jury, the prosecutor clarified that her reason for excluding Juror 016 was not her youthful age at all. Instead, her reason for excluding Juror 016 related to particular characteristics that the prosecutor associated with her youth–namely, the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community.[8]

The state court of appeal, however, glossed over the prosecutor's clarification and found that the sole basis upon which the trial court had permitted the prosecutor to exclude

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8. The fact that the trial court acknowledged that Juror 016 "was a youthful person, as was 006[,a]nd one or more other prospective jurors also,"is of no moment. Although the trial court seemed to credit the prosecutor's proffered youthful age justification by a cross-racial comparison of youthful jurors who were excused (the record implies that Juror 006 was not member of a racial minority), the court ignored the prosecutor's clarification that she did not strike Juror 016 because of her "youth," but rather because Juror 016 may have been "tt tolerant for this type of case."

We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 "was a youthful person, as was 006." Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to establish just how old Juror 016 might have been.

Juror 016 was her age. It concluded that because the exclusion of jurors on the basis of their age did not violate the Fourteenth Amendment, Collins had failed to meet his burden of proving purposeful discrimination. However, the state appellate court's characterization of the prosecutor's reason for striking Juror 016 was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Indeed, the evidence in the trial record is clear and convincing that the prosecutor's proffered justifications for striking Juror 016 on the basis of her youthful age–possible tolerance of drug use and lack of ties to the community–were pretexts for purposeful discrimination.

With regard to Juror 016's possible tolerance,[9] during voir dire, Juror 016 answered "yes" to the court's question regarding whether she believed that possession of cocaine should be against the law, and she also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on Collins' case. There is no other evidence in the record that remotely suggests that Juror 016 was otherwise sympathetic to or tolerant of individuals involved with drug use or possession. Juror 016 told the court that neither she nor her family members or any of her close friends had ever had a problem with drugs or alcohol; nor had they ever been accused of committing a crime involving illegal drugs. No other information regarding drug use, drug laws, or criminal enforcement of drug laws was solicited by the court or

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9. Although the fact that Juror 016's purported tolerance "corresponds to a valid for-cause challenge [helped] demonstrate its race-neutral character" at step 2, *Hernandez*, 500 U.S. at 363, the fact that nothing in the record supports the prosecutor's claim erodes the credibility of her explanation at step 3.

counsel, and Juror 016 never gave the court any information regarding her age. The prosecutor's clarification that Juror 016 might be "too tolerant for this type of case" as a basis for striking Juror 016 is therefore contrary to the evidence in the record. *See Purkett* , 514 U.S. at 768 ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."); *McCain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (rejecting prosecutor's attempt to attribute to challenged juror "beliefs that she did not hold" about "mistrust[-ing] the system," where juror never made such a statement and indicated to the court that she did believe her son had been treated fairly by "the system").

The prosecutor later attempted to explain that Juror 016 was "single, no ties," presumably indicating that she was not married and possibly had no children. However, as we have already explained, *Batson* is clear that the prosecutor's proffered justifications must be reasonably "related to the particular case to be tried." 476 U.S. at 98; *see also Bishop*, 959 F.2d at 825 (stating that a prosecutor's reason for dismissing a potential juror must have some nexus to her "possible approach to specific trial"). The trial court record fails to establish how Juror 016's marital or parental status would have had any bearing on her ability to serve as a juror in a case involving prosecution for crack cocaine possession, and the prosecutor failed to offer any such explanation. Further, the record shows that the prosecutor did not strike Juror 015, a white juror who possessed the same objective characteristics as Juror 016: both were single, employed females with no children who responded to the court's questions in the same manner, thereby revealing the pretextual nature of this justification.[10] *See United States v.*

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10. The prosecutor attempted to prove the race-neutral character of this justification by comparing Juror 016 with Juror

Alanis, 335 F.3d 965, 969 (9th Cir. 2003) ("Peremptory challenges cannot be lawfully exercised against potential

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006, a white male, noting "[s]he and Mr. 006 were both single, no ties," *See Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."). The record reveals, however, that Jurors 016 and 006 had very different backgrounds and thus did not possess "comparable characteristics" for purposes of the cross-racial analysis discussed in *Turner*, Juror 006, like Juror 016 was single, but, in contrast to Juror 016, Juror 006 had never been employed and, significantly, had an uncle who was a recovered alcoholic. This evidence is inconsistent with the prosecutor's assertion that there was a white juror with comparable characteristics who was dismissed for being single with no children. *Compare Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994) (holding that counsel may treat minority and nonminority jurors differently when there are subjective differences between them, although that party cannot insulate an explanation from appellate review simply by couching it in "vague and subjective terms") *with Turner*, 121 F.3d at 1251-52 (perceiving no basis to distinguish a challenged and unchallenged juror and holding that their similarity provided evidence of pretext); *cf. United States v. Lewis*, 837 F.2d 415, 417 & n.5 (9th Cir. 1988) (concluding that there was no evidence of pretext when the decision to strike the juror turned on "the interplay of various factors" identified by the prosecutor and "no unchallenged juror possessed all the cited characteristics").

We further note that, contrary to the suggestion made by the dissent, because Jurors 006 and 016 did not possess comparable characteristics, the comparison between the two did not provide a potential reason for the trial court to conclude that the prosecutor was credible.

jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged."); *Lewis*, 321 F.3d at 832-33 ("[A] comparative analysis of D.F. with empaneled jurors reveals that a finding of pretext was warranted."); *McCain*, 217 F.3d at 1221-22 (holding that where a non-black juror with no prior jury experience was empaneled, the proffered reason for striking a black juror for lack of jury experience was not genuine and therefore was pretextual); *cf. Miller-El*, 537 U.S. 322, 123 S. Ct. at 1043 (noting the fact that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" showed that the strikes "might have been selective and based on racial considerations").

[7] The prosecutor also claimed that Juror 016's youth was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and Juror 019]; that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important." Not only is the prosecutor's statement that Juror 016 had a "lack of ties in the community" not sufficiently "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, but it is also not supported by the record and does not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. *See id.* at 88 (holding that the prosecutor's exercise of peremptory challenges must be "related to his view concerning the outcome") (internal quotation marks omitted); *McCain*, 217 F.3d at 1223 (stating that where the prosecutor did not explain the significance of a juror's body language, the prosecutor's claim that he struck that juror "on the sole basis that she had her elbow on the chair is patently frivolous," especially where no other evidence in the record indicated any possible bias).

[8] In sum, there was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age. This evidence supports Collins' claim that the prosecutor struck Juror 016 because of her race, and also demonstrates that the state appellate court was unreasonable when it determined that the trial court did not err by determining that Collins had failed to prove purposeful discrimination. However, because the appellate court offered Juror 016's demeanor as an alternative explanation, we must assess whether the court unreasonably determined that the trial court had properly accepted that justification as nondiscriminatory before determining the ultimate significance of the appellate court's conclusion regarding Juror 016's age.

2. Demeanor

The state court of appeal also concluded that even if the prosecutor's reliance on Juror 016's youthful age had been improper, the "prosecutor reasonably could have interpreted prospective [Juror 016's] body language as indicative of hostility or disrespect" and properly dismissed her on that basis. Although the trial court did not witness Juror 016's alleged offensive conduct, the appellate court determined there was "*nothing* in the present record" indicating that the trial court should not have given the prosecutor the benefit of the doubt or that it had failed to evaluate whether the prosecutors' justifications should have been accepted.

As the record reflects, the state appellate court reasonably determined that the trial court had not observed Juror 016's demeanor but nonetheless accepted this alternate reason for striking Juror 016 on the basis of the prosecutor's credibility. Because the trial court did not observe Juror

016's demeanor, the critical question here is whether the appellate court's determination that the trial court properly credited the prosecutor's representation was unreasonable.[11/] Notably, the basis for the state appellate court's determination was its conclusion that there was "nothing in the present record" to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility. We conclude that this determination was unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking Juror 016 and 019.

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11. In response to the prosecutor's characterization of Juror 016's alleged conduct, the trial court responded: "the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney." In light of the trial court's statement and the fact that there is nothing in the trial transcript (except the prosecutor's representation) which indicates that Juror 016 answered any question by stating "uh-huh" or that she had rolled her eyes or turned away, the appellate court reasonably determined that the trial court had accepted the prosecutor's statements about Juror 016's demeanor as true. Its corresponding conclusion–that a peremptory challenge exercised on the basis of a juror's body language would not be improper–was also reasonable. *See Burks*, 27 F.3d at 1429 & n.3 (noting that trial counsel's evaluation of a potential juror's demeanor, tone, and facial expressions may lead to a "hunch" or "suspicion" that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate); *United States v. Power*, 881 F.2d 733, 740v (9th Cir. 1989) (accepting as legitimate the government's explanation that a juror's "fidgeting and looking around as he sat in the jury box . . . made the prosecutor believe that the individual would not be an attentive juror").

First, we note that the prosecutor consistently identified Jurors 016 and 019 as "both young."[12/] However, the record reveals that Juror 019 was at least a middle-aged grandmother. Indeed, Juror 019 informed the court that she was a retired nurse with seven grown children, the youngest of which had five children of her own. A prosecutor supplied with this information could not credibly identify Juror 019 as young. This incorrect factual statement supports Collins' argument that the prosecutor was not credible. *See McCain*, 217 F.3d at 1222 (holding that reasons for excusing black jurors that were objectively contradicted by the record provided evidence of purposeful discrimination); *Caldwell v. Mahoney*, 159 F.3d 639, 651 (1st Cir. 1998) (holding that serious questions of pretext arise when the facts in the record are "objectively contrary to" the prosecutor's proffered justifications).

In addition, the trial court judge rejected the prosecutor's justification for striking Jurors 016 and 019 on the basis of gender. This too supports the argument that the prosecutor

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12. Although Collins does not challenge the prosecutor's strike against Juror 019, this strike is relevant to Collins' *Batson* challenge. *See Hernandez*, 500 U.S. at 363 (holding that a prosecutor's motive "may often be inferred from the totality of relevant facts") (internal quotation marks omitted); *Purkett* , 514 U.S. at 768-69 (holding that at step three, the trial court must evaluate the persuasiveness of the prosecutor's justification); *Batson*, 476 U.S. at 98 (holding that the trial court must decide whether the prosecutor's explanation for the strike is pretextual); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (noting that the trial court "has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances:).

dismissed Juror 016 on the basis of her race.[13] *See Lewis*, 321 F.3d at 834 (stating that the fact that the trial court had found some of the prosecutor's arguments unconvincing "does not support the prosecutor's credibility; it undermines it"). Further, the fact that the prosecutor attempted to offer a facially discriminatory justification for dismissing the only black female jurors in the venire, and then quickly abandoned this justification when informed by the trial judge that it was improper, is another indication that the prosecutor's stated justifications were a pretext for discrimination. *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040 ("Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are.").

Finally, although the trial court credited the prosecutor as excusing Juror 019 for a race-neutral reason because she had a daughter who had completed rehabilitation for cocaine addiction, the record demonstrates that another white juror, Juror 030, whose son recovered from a cocaine addiction—a highly comparable situation—was not dismissed by the prosecutor. Because "[p]eremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged," *McCain*, 217 F.3d at 1221, the prosecutor's dismissal of Juror 019 provides further evidence of the prosecutor's discriminatory intent. *See Hernandez*, 500 U.S. at 363 (stating that a prosecutor's motive may be inferred from the totality of relevant facts);

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13. In rejecting the prosecutor's initial references to gender, the trial court explained: "I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see . . . that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it."

Riley v. Taylor, 277 F.3d 261, 283 (3d Cir. 2001) ("The relative plausibility or implausibility of each explanation for a particular challenge may strengthen or weaken the assessment of the prosecution's explanation as to other challenges.") (internal quotation and alteration marks omitted).

The prosecutor's objectively unreasonable statements regarding Juror 019's age, her pretextual justifications for dismissing Juror 019, and her attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019, combined with her pretextual justifications for dismissing Juror 016 on the basis of her alleged lack of community ties, her marital status, and her purported tolerance, and the fact that nothing in the record corroborated her allegations regarding Juror 016's demeanor, provide "clear and convincing evidence" that the prosecutor did not dismiss Juror 016 on the basis of her demeanor. In light of the evidence in the record, the appellate court's determination that the prosecutor dismissed Juror 016 because of her demeanor was an unreasonable determination of the facts. Because this determination provided the basis for the appellate court's conclusion that the trial court had not clearly erred in accepting the prosecutor's justification as race-neutral, this determination also was objectively unreasonable, *See Johnson*, 3F.3d at 1331 ("When there is reason to believe that there is a racial motivation for the challenge" we are not "bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it."); *Lewis*, 321 F.3d at 833-34 (holding that where justification for strike was not corroborated by the record and the prosecutor was not credible, the proffered justification could not support state court's conclusion that petitioner had failed to prove purposeful discrimination).

C.

The state court of appeal held that Collins had failed to establish purposeful discrimination on the basis of its objectively unreasonable determination that the prosecutor properly dismissed Juror 016 because of her age. The appellate court's alternative ruling–that the trial court properly credited the prosecutor's assertion that Juror 016 had rolled her eyes and turned away from the court when asked a question during voir dire, and that her dismissal based on Juror 016's demeanor did not proved any evidence of purposeful discrimination–is also unsupported by the record. Thus, clear and convincing evidence demonstrates that there was no credible basis for dismissing Juror 016 on the basis of her age of demeanor.

[9] there is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.[14/]

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14. The fact that a black man and "a female juror that [was] of African-American color, black color" remained in the venire does not alter our conclusion. *See Turner*, 121 F.3d at 1254 ("[A]lthough the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive, [] it is not dispositive."); *Palmer v. Estelle* but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*.")

In order to secure habeas relief, however, Collins "must demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1045. We conclude that Collins has met this heavy burden.

1.

[10] The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justification that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins' claim of pretext, however, is supported by the record–the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record . . . indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of

its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).[15/]

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15. Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court *can disagree* with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 123 S. Ct. at 1041; *see also Hall v. Dir. of Corrs*, 343 F.3d 976, 984 n.8 (9th Cir. 2003) ("AEDPA, although emphasizing proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye.") Critical to our analysis are the ten different reasons offered by the prosecutor for dismissing Jurors 016 and 019. As our analysis reflects, one of the reasons was facially discriminatory, two reasons were contradicted by the record, one reason was not applied to a comparably similar juror who was not struck, and four reasons were without any support in the record.

2.

Further, although the appellate court identified the three-step inquiry for identifying purposeful discrimination under *Batson*, it unreasonably applied *Batson*'s third prong in determining that the trial court had fulfilled its *duty* to determine whether Collins had established purposeful discrimination. *See Andrade*, 123 S. Ct. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). It is well-established that "once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, the trial court then has the *duty to determine if the defendant has established purposeful discrimination.*" Hernandez, 500 U.S. at 363 (emphasis added) (internal quotation marks omitted); *id.* at 359 (holding that the "trial court *must* determined whether the defendant has carried his burden of proving purposeful discrimination") (emphasis added); *Batson*, 476 U.S. at 98 ("The trial court will then have the *duty* to determine if the defendant has established purposeful discrimination.") (emphasis added). As the Supreme Court has emphasized, "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and must evaluate the "genuineness of the [prosecutor's] motive," *Purkett*, 514 U.S. at 769. Thus, a state appellate court's decision that overlooked a trial court's failure to evaluate the persuasiveness of the prosecutor's justifications in conducting this inquiry would rest on an unreasonable application of well-established Supreme Court precedent. *See Lewis*, 321 F.3d at 832 ("Unlike the trial court, a court of appeal is not in an ideal position to conduct a step three evaluation. It can, however, use the trial court's findings and the evidence on the record to evaluate the support on the record for the prosecutor's reasons and credibility, and to compare the struck and empaneled jurors.")

Here, the appellate court's determination that "nothing in the present record" indicated that the trial court failed to evaluate the prosecutor's credibility must have been based either (1) upon a conclusion that there was no evidence that undermined her credibility or (2) upon a belief that the record demonstrated that the trial court had assessed any such evidence in evaluating the persuasiveness of the prosecutor's justification. The record belies either conclusion.

[11] As we have discussed, the prosecutor's attempt to justify her challenge of Juror 016 on the basis of her age, specifically on account of her marital status, her alleged lack of community ties, and her purported tolerance, was unsupported by the record. In addition, the prosecutor's attempt to justify her strike of Juror 019 on the basis of her youthful age was contradicted by the record, while her justification based on Juror 019's daughter's past cocaine addiction was pretextual given that a white juror (Juror 030) with comparably similar characteristics was permitted to serve on the jury. The trial court acknowledged that it had not observed Juror 016's alleged demeanor, and nothing in the record corroborates the prosecutor's allegations. It also rejected the prosecutor's justifications relating to gender as clearly violative of the Fourteenth Amendment. Thus, contrary to the appellate court's assessment of the record, the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016 and 019. The appellate court's contrary determination demonstrates that, although it recognized the trial court's duty under *Batson* to determine whether Collins had show purposeful discrimination, it unreasonably applied that principle in concluding that the trial court had done so.

IV.

[12] Because the basis for the appellate court's decision was its unreasonable determination of the facts in light of the evidence presented at the trial, and because it also unreasonably applied clearly established federal law as determined by the Supreme Court, we conclude that the state trial appellate court committed constitutional error that warrants the grant of a writ of habeas corpus under section 2254. We therefore reverse the district court's judgment and remand with instructions to grant the petition on conditions it deems appropriate.[16]

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16. In light of our disposition, we need not address Collins' 8th Amendment argument that his three strikes sentence was cruel and unusual. *But see Andrade*, 123 S. Ct. 1166.

REVERSED and REMANDED.

HALL, Circuit Judges, dissenting:

The state trial court determined that the prosecutor's proffered race-neutral justifications for striking Juror 016 were credible. This conclusion is entitled to "great deference," *Hernandez v. New York*, 500 U.S. 352, 364 (1991), and may not be disturbed on appeal unless clearly erroneous. *Id.* at 369; *see also Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003) (reasoning that because an appellate court has access only to the trial transcript, it is "not as well positioned as the trial court is to make credibility determinations."). Applying this deferential standard, the California Court of Appeal found that the trial court did not err. Because this case is governed by AEDPA, we must defer to the California Court of Appeal's conclusion unless contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or premised on an unreasonable factual finding. 28 U.S.C. § 2254(d).

The majority does not defer to the California Court of Appeal. According to the majority, deference is unwarranted because the Court of Appeal's decision rests upon the "unreasonable factual determination" that "there was 'nothing in the present record' to indicated that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the

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prosecutor's credibility." In point of fact, the Court of Appeal held only that the trial court's *ultimate* decision to credit the prosecutor was not clearly erroneous, thereby adhering to the well-established principle that "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369.

Having manufactured a reason to disregard the California Court of Appeal's decision, the majority essentially reviews the issue of the prosecutor's credibility *de novo*, concluding that the writ should issue because, under the majority's view, "the record belies" the conclusion that the trial court assessed evidence which ostensibly undermined the prosecutor's credibility. In doing do, the majority disregards the canonical rule that evaluation of a prosecutor's credibility "lies peculiarly within a trial judge's province," and is entitled to "great deference." *Id.* at 366[1]

Viewing the record in its entirety, I am firmly convinced that the California Court of Appeal's decision was reasonable. I respectfully dissent.

* * * *

The majority identifies four consideration potentially relevant to the prosecutor's credibility. In order to reject the California Court of Appeal's decision, we would have to

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1. Contrary to the majority's view, the state appellate court has no duty to make its own purposeful discrimination determination. Indeed, this would beyond the scope of the state appellate court's review. In the *Batson* context, a state appellate court's duty is limited to determining whether the *trial court's* purposeful discrimination finding was *clearly erroneous*. *E.g.*, *Hernandez*, 500 U.S. at 366-67.

conclude that the Court of Appeal *unreasonably* determined that, given these four considerations, the trial court did not *clearly err* by crediting the prosecutor's race-neutral explanation. As the following discussion illustrates, the majority falls far short of making this requisite demonstration.

The majority argues that the trial court should have questioned the prosecutor's credibility because she referred to *another* prospective juror, Juror 019, as "young" even though Juror 019 was a grandmother of five. As the majority suggests, the prosecutor may have either been entirely incapable of judging a person's age or may have intentionally misrepresented Juror 019's age to the court. A fair more plausible explanation, on the other hand, is that the reference to Juror 019 as "young" was purely accidental. The statement at issue occurred during a discussion about Juror 016, Juror 019, and Juror 006, a young ,single white male against whom the prosecutor also exercised a peremptory strike. Because Jurors 016 and 019 were the subject of the *Batson* challenge, both jurors were repeatedly referred to in tandem. Similarly, Jurors 016 and 0066 were referred to together several times by the prosecutor, who argued that the two young, single jurors were similarly situated. In this context, it is not surprising that the prosecutor would, on one occasion, flip the designations "006" and "019." Indeed, defense counsel also seemed confused about the numerical designations, once mistakenly referring to Juror 016 as "Ms. 019."[2/] Both the trial judge and defense counsel clearly indicated that they understood the prosecutor's justification for striking Juror

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2. After noting that one of the prosecutor's justifications for striking *Juror 016* was a lack of information, defense counsel argued, "if [the prosecutor] wanted more information, she could have asked the court to ask more questions of *Ms. 019*."

019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant.[3/] Under these circumstances, the majority's focus on the prosecutor's misstatement,[4/] an issue that was not briefed by the parties, is nothing short of absurd.

The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral justifications, including Juror 016 demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications offered by that prosecutor.[5/] In the instant case, the trial judge

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3. Summarizing the prosecution's argument, defense counsel stated: "[The prosecutor] has compared Ms. 016 to Mr. 006, which she excused by saying they were both young. . . . And Ms. 019, certainly, indeed, said that she had . . . one daughter which she said a cocaine problem and that she had been involved with treatment for the daughter."

4. Indeed, the prosecutor's "incorrect factual statement" is the majority's lead argument in support of its conclusion that the trial court clearly erred in considering the prosecutor to be credible.

5. The majority quotes this court's decision in *Johnson v. Vasquez*, 3F.3d 1327 (9th Cir. 1993), for the proposition that "'[w]hen there is reason to believe that there is a racial motivation of the challenge,' we are not 'bound to accept at face

rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights nothing in the record to indicate that the California Court of

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value a list of neutral reasons that are either unsupported in the record or refuted by it.'" *Id.* at 1331. This reference is misleading, however, First of all, the *Johnson* court was confronted with a case in which the prosecutor's own statements "strongly suggest[ed] that [he] responded to defense counsel's alleged exclusions of other minority venire members by excluding a member of defendant's race." *Id.* at 1330. Hence, this court's admonition that "when there is reason to believe that there is a racial motivation for the challenge . . . we are not bound" was a direct reference to the prosecutor's tacit admission that he was excluding members of the venire based on their ethnicity, an integral element of the *Johnson* decision which is not present in the instant case.

Second, the majority omits crucial language from the *Johnson* decision which bears on its relevance to the case at bar. Specifically, we noted that "*neither the trial courts nor we* are bound to accept" the prosecutor's ostensibly neutral rationales at face value. *Id.* at 1331 (emphasis added). Viewed in context, the language from our *Johnson* decision clarifies the majority's fundamental mistake in this case. Once the trial court decides to "accept at face value" a "list of neutral reasons" proffered by the prosecutor, we are bound by precedent to grant that decision "great deference." *Hernandez*, 500 U.S. at 366

Finally, even if the language from *Johnson* were pertinent to the instant case, it nonetheless fails to dispute the point that, even if a trial or appellate court chose not to accept *one* (or more) of the prosecutor's articulated justifications, they would not thereby be compelled to reject *all* of the proffered rationales.

Appeal should have deemed this decision *clearly erroneous*.

The third credibility issue raised by the majority also relates to Juror 019 rather than Juror 016. Making an argument not presented by Collins either before this court or before the California Court of Appeal, the majority contends that the prosecution's explanation that Juror 019 had a daughter recently treated for cocaine addition was pretextual because a white juror passed by the prosecution, Juror 030, also had a child with a cocaine problem. There are several fundamental problems with the majority's analysis of this issue. The issue was not briefed by the parties or discussed at oral argument, and the record itself certainly does not contain clear and convincing evidence that Juror 019 and Juror 030 were, as the majority terms them, "indistinguishably similar."[6/] Moreover, even if one accepts the majority's shaky premise that Jurors 019 and 030 were "indistinguishably similar," there is no Supreme Court

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6. For example, Juror 019's daughter's cocaine problem were more recent (two years) than was Juror 030's son's problem (six years). There may also have been significant differences in the demeanor of each prospective juror that are not evident from the trial transcript.

By way of contrast, compare the majority's conclusion that Juror 019 and 030 are indistinguishable to its own discussion of the dissimilarity of Jurors 006 and 016, which is relegated to a footnote. In support of its claim that the prosecutor's alleged rationales for dismissing Juror 016 (her marital status and lack of community ties) were pretextual, even though Juror 006 was also dismissed on the same grounds, the majority summarily concludes that "[t]he record reveals . . . that Jurors 006 and 016 had very different backgrounds and thus did not possess 'comparable characteristics,'" even though Jurors 006 and 016 "were both single, no ties."

precedent indicating that a race-neutral justification is necessarily pretextually merely because it applies to another member of the venire. Similarly, there is a complete dearth of Supreme Court precedent indicating that a trial judge may not credit a prosecutor's race-neutral justification if there is reason to believe that the race-neutral justification given for *another* juror was pretextual. For these reasons, the prosecutor's conduct vis-avis Juror 019 lends very little, if any, support to the majority's conclusion that the trial judge should have questioned the prosecutor's explanation for striking Juror 016.

Finally, the majority contends that the prosecutor's explanation that Juror 016 was a youthful single person, and therefore potentially too tolerant, was not credible. Noting that Juror 016 "believed possession of crack cocaine should be illegal," the majority concludes that the prosecutor's concern that Juror 016 might be too tolerant for this three strikes case was "patently frivolous." The majority's conclusion is simply untenable — the theory that young persons, even those who believe crack cocaine should be illegal and don't expressly indicate any heightened tolerance for drug offenders, may be less willing to impose harsh sentences for drug possession than their older counterparts in the venire can hardly be considered unreasonable, much less "implausible or fantastic."

Indeed, the majority's own analysis demonstrates precisely why the Court of Appeal properly deferred to the trial court's judgment. The majority strains to find that the credibility issues discussed above constitute "clear and convincing" evidence which not only undermines the prosecutor's credibility, but makes clear that the prosecutor's articulated rationales for her peremptories were "wholly implausible." Viewing the majority's credibility argument generously, however, their conclusion is merely that the trial court had several potential reasons to question the

prosecutor's credibility. Presumably, the trial court also had a variety of potential reasons to believe that the prosecutor *was* credible, including the prosecutor's ostensibly truthful comparison between Juror 016 and Juror 006. Significantly, the trial judge also had the ability to observe the prosecutor's demeanor to determine whether she appeared to be telling the truth, evidence which would not be evident in the record. Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications. *See Hernandez*, 500 U.S. at 369 ("Where there are two permissible views of the evidence, the fact-finder's choice between the cannot be clearly erroneous." *See also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (stating that Section 2254 "demands that state court decisions be given the benefit of the doubt").

For the forgoing reasons, I would affirm.

APPENDIX C

NOT FOR PUBLICATION

FILED

APR 29 200

CATHY A. CATTERSON, CLERK
U.S COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN MARTELL COLLINS, Petitioner - Appellant, *v.* BERTRAM RICE; et al., Respondents-Appellees.	No. 01-56958 No. CV-98-09329-THJ Central District of California Los Angeles **ORDER**

Before: **PAEZ,** Circuit Judge.

Respondents-appellees' Motion for Stay of Mandate is **GRANTED**. The mandate shall be stayed for ninety days.

APPENDIX D

LODGED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY Mc DEPUTY

FILED
CLERK, US DISTRICT
AUG 31 2001
CENTRAL DISTRICT COURT
BY Mc DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEVEN MARTELL COLLINS, Petitioner, v. BERTRAM RICE, Warden, Respondent.	Case No. CV 98-9329 TJH (AN) ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has review the file, including the Magistrate Judge's Report and Recommendation, *de novo*.

IT ORDERED:

1. The Report and Recommendation is approved and adopted.

2. Judgment shall be entered dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order and the Judgment on all counsel or parties of record.

ENTER ON ICMS

DATED: 8/28/04, 2001 / s /

AUG 31 2001 TERRY J. HATTER, JR.

CHIEF UNITED STATES

DISTRICT JUDGE

APPENDIX E

ENTERED
AUG 31 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA OFFICE
BY \S\ DEPUTY

ENTER/JS-7
PRIORITY SEND
FILED
CLERK, U.S. DISTRICT COURT
AUG 31 2001
CENTRAL DISTRICT CALIFORNIA
MC DEPUTY

LODGED
CLERK, U.S. DISTRICT COURT DISTRICT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY MC DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEVEN MARTELL COLLINS,) Case No. CV 98-9329 TJH (AN)
)
Petitioner,)
)
v.) JUDGMENT
)
BERTRAM RICE, Warden,)
)
Respondent.)
)

IT IS HEREBY ADJUDGE that this action is

dismissed with prejudice for the reasons set forth in the related Magistrate Judge's Report and Recommendation.

DATED: 8/28/01, 2001

HATTER / S /
TERRY J. HATTER, JR.

ENTER ON ICMS
AUG 31 2001

APPENDIX F

Filed
Clerk, U.S. District Court
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY MC DEPUTY

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEVEN MARTELL COLLINS, Petitioner, v. BERTRAM RICE, Warden, Respondent.	Case No. CV 98-9329 TJH (AN) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Terry J. Hatter, Jr., Chief United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Court deny the Petition for Writ of Habeas Corpus and dismiss this action with prejudice.

I. Proceedings

On August 29, 1996, a Los Angeles County jury found petitioner guilty of possession of a controlled substance in violation of Health and Safety Code § 11350(a). [Clerk's Transcript ("CT") at 108, 112.] The jury also found truce the allegations that petitioner had two prior serious felony

convictions within the meaning of California Penal Code §§ 667(b) - (i) & 1170.12(a) - (d) (California's "Three Strikes Law"), and that he served three prior prison terms within the meaning of Penal Code §§ 667.5(b) & 1203(e)(4). [CT at 109-10, 112.] The court struck sentence enhancements for petitioner's prior prison terms, and petitioner was sentenced to twenty-five years to life imprisonment. [CT at 120-22.]

Petitioner appealed to the California Court of Appeal, which affirmed the judgment. [Return Exs. A; B at 105.] Petitioner then filed a Petition for Review with California Supreme Court, which denied the petition without comment or citation on February 18, 1998. [Return Exs. C; D.] Petitioner thereafter filed a Petition for Writ of Habeas Corpus with the California Supreme Court. [Return Ex. E.] The court denied the petition on June 24, 1998. [Return Ex. F.]

On November 19, 1998, petitioner initiated this action by filing with the Court a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. On January 11, 1999, he filed a First Amended Petition, followed by a Second Amended Petition on January 29, 1999, which raised three grounds for relief. On April 6, 1999, respondent filed a Motion to Dismiss the Second Amended Petition, arguing that petitioner's third claim - that the trial court's failure to strike a prior felony conviction violated petitioner's Fourteenth Amendment rights - was unexhausted. [Mot. to Dismiss at 3-8.] Petitioner subsequently elected to strike his third claim, and the Court approved the voluntary dismissal on June 14, 1999. [Resp. to Min. Order dated May 11, 1999, at 2; Min. Order dated June 14, 1999.] Respondent filed a Return to the Second Amended Petition on September 13, 1999, contending that petitioner's two remaining grounds for relief fail on the merits. Petitioner filed a Traverse on February 24, 2000.

II. Petitioner's Contentions

Petitioner raises two grounds for relief. Petitioner argues that the sentence of 25 years to life violates his Eighth Amendment right against cruel and unusual punishment. [Second Amended Petition at 6.] Petitioner also argues that the trial court improperly denied his Wheeler motion, which objected to the prosecutor's peremptory challenge against a prospective African-American juror. [Id.]

III. Discussion

A. Standard of Review

The current standard of federal habeas review dictates that federal courts must defer to state court decisions which previously addressed pending habeas claims on the merits, unless the state court proceeding:

> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law if the state court applies a rule that contradicts the governing law set forth by the Supreme Court, or if the state court confronts a set of facts that are materially indistinguishable from those in a Supreme Court decision and nevertheless arrives at a different result. Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the

decisions of the Supreme Court but unreasonably applies that principle to the facts of the case, Id. at 407-408.

However, to find an unreasonable application of federal law, a federal habeas court may not conclude merely that the petitioner has the better of two reasonable legal arguments. Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.), *cert. denied,* 121 S.Ct. 340, 148 L.Ed. 2d 274 (2000). Rather, the reviewing court must find that "clear error" occurred. That is, the reviewing court must be left with a firm conviction that one answer, the one rejected by the state court was correct and the other, the application of federal law that the state court adopted, was erroneous. Id.

This standard of review applies to claims that are adjudicated on the merits in a state court proceeding. In the present case, the California Supreme Court denied petitioner's Petition for Review. Although this denial was without explanation or comment, such summary denial is a denial on the merits. Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), *cert. denied,* 510 U.S. 887, 114 S.Ct. 240, 125 L.Ed. 2d 194 (1993). When a higher court issues a summary denial, the last reasoned state court decision can be assumed to form the basis of the higher court's denial. Y1st v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, the Court of Appeal opinion, which expressly rejected petitioner's claims on the merits, satisfies the requirement of adjudication on the merits. Therefore, this Court must apply 28 U.S.C. § 2254(d)'s deferential standard of review to this case.

B. Cruel and Unusual Punishment

In his Eighth Amendment claim, petitioner contends that his sentence of twenty-five years to life for a drug offense constitutes cruel and unusual punishment. [Second Amended Petition at 6.] Petitioner reasons that his current felony is

non-serious, that he does not pose a threat to society, and that his prior felony convictions, which arose from a single episode, are remote in time. [Id. at 28-32.] He further argues that his sentence is as harsh as, if not harsher than, sentences imposed for more serious felonies such as rape, murder, and robbery. [Id. at 32-33.] Petitioner also contends that his crime of drug possession warrants shorter penalties in other jurisdictions. [Id. at 33-36.] As such, petitioner believes his sentence is grossly disproportionate. As discussed below, petitioner's claim lacks merit.

In rejecting petitioner's reasoning, the Court of Appeal held that "[a] severe punishment is merited herein based on Collins's prior serious or violent felonies convictions and his status as a repeat offender. In light of Collins's individual circumstances and criminal history, the term is not grossly disproportionate. . . ." [Return Ex. B at 104.] The court further concluded that petitioner's sentence does not constitute cruel and unusual punishment because it is not "'so disproportionate to the crime for which it is inflicted that it shocks the conscience nd offends fundamental notions of human dignity.'" [Id.]

""The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring). Outside the context of capital punishment, it is extremely difficult to establish that a particular sentence is grossly disproportionate. Rummel v. Estell, 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). Non-death penalty sentences almost always are upheld against Eighth Amendment challenges, even where the offense is non-violent. Id.

Indeed, the Supreme Court has stated that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Id. at 274. Thus, as long as a sentence of imprisonment for a non-capital felony does not exceed statutory limits, it usually will not be overturned on Eighth Amendment grounds. United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988).

Here, petitioner was convicted of a non-capital offense, and his sentence fell within statutory limits prescribed by California Penal Code §§ 667(b) - (i) and 1170.12(a) - (d). Furthermore, petitioner is a multiple felony offender. He was convicted of robbery and forcible rape in 1982, and possession of a firearm by a felon in 1993. [CT at 58, 63.] Petitioner's current offense is a serious narcotics violation which took place within six months of petitioner being paroled. [Probation Report at 130.][1/] Petitioner is clearly a recidivist whose conduct is sanctionable under California's Three Strikes Law. CAL. PENAL CODE §§ 667(b) - (i), 1170.12(a) - (d). Eighth Amendment challenges to sentences based on recidivism statutes generally do not survive. Rummel, 445 U.S. at 268. A state has a valid interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." Id. at 276.

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1. Although this court's Order dated September 16, 1999, sealed pages 66-72 of the Reporter's Transcript as well as petitioner's Probation Report, the Order is hereby modified to allow limited reference to non-sensitive, non-identifying information.

Taken together, these factors weigh against a finding that petitioner's sentence is disproportionate. Petitioner's sentence of twenty-five years to life is not cruel or unusual in light of the seriousness of his current offense and his prior criminal conduct. Accordingly, the decision of the state court was not contrary to or an unreasonable application of clearly established federal law, and petitioner's Eighth Amendment claim must fail.

C. Trial Court Denial of Wheeler Motion

During jury selection, petitioner made a motion pursuant to People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), objecting to the prosecutor's peremptory challenge against a prospective African-American juror. [Reporter's Transcript ("RT") at 66.] In response to the motion, the judge ruled that petitioner had established a prima facie case of discrimination, and ask the prosecutor to justify her peremptory challenge. [Id. at 66, 68.] The prosecutor responded that her challenge was prompted by the juror's young age, and by an observation that the juror "rolled her eyes" during questioning. [Id. at 66-67.] Although the judge did not personally observe the juror's demeanor, the judge indicated that he was prepared to give the prosecutor "the benefit of the doubt," and that the prosecutor's concerns about the juror's age also justified the challenge. [Id. at 71-72.] The trial judge therefore denied petitioner's motion. [Id. at 72.]

Petitioner claims that the trial court erred by denying his Wheeler motion because the prosecutor's reasons were insufficient to overcome an inference of racial discrimination. [Second Amended Petition at 6, 25.] Petitioner contends that the juror's young age was not a valid reason for a peremptory challenge, since youths constitute a cognizable group which may not be discriminated against in jury selection. [Id. at 19-22.] Petitioner also argues that by giving the prosecutor the

"benefit of the doubt" as to the juror's demeanor, the trial judge failed to make a "sincere and reasoned effort" to evaluate the credibility of the prosecutor's justifications. [Id. at 22-25.]

In rejecting petitioner's arguments, the Court of Appeal noted that "there is no case law to support the proposition the young are a cognizable class for the purposes of a Wheeler motion. Rather, numerous courts have expressly declined to recognize age as a factor that defines a cognizable group." [Return Ex. B at 101.] The court further opined that the trial court's findings were "entitled to great deference on appeal," and that "[a]bsent a showing by the defendant to the contrary, [the court] 'rel[ies] on the good judgment of the trial [court]' to evaluate whether the prosecutor's reasons were bona fide." [Id. at 102-03.] Thus, the court concluded that the trial judge properly denied petitioner's Wheeler motion, and that petitioner was not denied a representative jury. [Id. at 103.]

The Equal Protection Clause forbids prosecutors from exercising peremptory challenges based on race. Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Where a defendant contends that a prosecutor's peremptory challenges are racially motivated, the court must conduct a three-step analysis. Id. at 96. In the first step, the defendant must make a prima facie showing that a prosecutor's peremptory challenges were racially motivated. Id. The preliminary issue of whether petitioner made a prima facie showing of discrimination becomes moot when the trial court proceeds directly to steps two and three of the Batson analysis. Stubby v. Gomez, 189 F.3d 1099, 1104 (9th Cir. 1999), *cert. denied sub nom.* Stubby v. Terhune, 121 S.Ct. 88, 148 L.Ed.2d 49 (2000).

In step two of the Batson analysis, "the burden shifts to the prosecution to articulate a race-neutral explanation for the exercise of the peremptory challenge in question." McCain

v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." Stubby, 189 F.3d at 1105.

Once the prosecutor has issued an explanation, the final step of the Batson analysis requires the trial judge to determine "whether the defendant has carried his burden of proving purposeful discrimination." McCain, 217 F.3d at 1220. The court has a duty to evaluate the credibility and persuasiveness of the prosecutor's explanations. Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); McCain, 217 F.3d at 1220. However, "[n]either Batson nor its progeny requires that the trial judge make specific findings, beyond ruling on the objection." United States v. Gilliam, 167 F.3d 1273, 1278 (9th Cir.), *cert. denied*, 528 U.S. 900, 120 S.Ct. 235, 145 L.Ed.2d 197 (1999).

A trial court's ultimate determination on the issue of intentional discrimination in jury selection is entitled to great deference, since the trial court's findings are largely dependent on the judge's observations of the attorneys and an evaluation of their credibility. Windham v. Merkle, 163 F.3d 1092, 1099 (9th Cir. 1999). Furthermore, "a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In the present case, the trial judge ruled that petitioner established a prima facie case of racial discrimination and required the prosecutor to justify her peremptory challenge. The prosecutor offered two race-neutral justifications for her peremptory challenge—the juror's demeanor and age. Both rationales were legitimate grounds for challenging the prospective juror. First, the prosecutor explained that the

juror "rolled her eyes" upon being question questioned by the judge. [RT at 66-67.] Certain types of juror behavior, including lack of eye contact, fidgeting, and inattentiveness, constitute race-neutral reasons for juror dismissal since the behaviors indicate disinterest in being a juror. See Stubby, 189 F.3d at 1105-07; United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993); United States v. Power, 881 F.2d 733, 740 (9th Cir. 1989). Thus, the juror's "eye-rolling" could have indicated that she was int interested in or respectful of the court proceedings. Although the trial judge did not personally observe the juror "roll" her eyes, he made a finding that the prosecutor's proffered explanation was sincere and legitimate, and this Court must respect that finding unless it is rebutted by petitioner with clear and convincing evidence. Petitioner has mad no such showing here.

The prosecutor also justified her peremptory challenge by noting her concern that the juror might be "too tolerant" of drug possession given her young age. [RT at 66-67.] Age groups are not protected classes for the purposes of jury selection. See United States v.Pichay, 986 F.2d 1259 (9th Cir. 1993); United States v. Jackson, 983F.2d 757, 762 (9th Cir. 1993). Furthermore, there is no indication in the record that the prosecution's age-related justification was a mere pretext for racial discrimination. The prosecutor challenged at least one Caucasian juror on the basis of age. [RT at 67, 71.] Such cross-racial consistency in the exercise of age-based peremptory challenges tends to indicate that the prosecutor's justification was race-neutral. Turner v. Marshall, 121 F.3d 1248, 1251-52 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153, 118 S.Ct. 1178, 140 L.Ed.2d 186 (1998). Given the absence of any showing by petitioner to the contrary, this Court must defer to the state courts' finding that the prosecutor's age-based justification was a sincere and legitimate ground for exercising the peremptory challenge.

The prosecutor offered facially race-neutral explanations for her peremptory challenge. The trial court found that these explanations were legitimate and that the prosecutor was not harboring any discriminatory intent. Petitioner has not rebutted these findings with clear and convincing evidence, and the decisions of the state courts were not contrary to, or an unreasonable application of, clearly established federal law. As such, petitioner's claim of discriminatory jury selection must be denied.

IV. Recommendation

For all of the foregoing reason, IT IS RECOMMEND that the District Court issue and order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: July 11, 2001 /s/

ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

LODGED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEVEN MARTELL COLLINS,	)	Case No. CV 98-9329 TJH (JN)
Petitioner,	)	
v.	)	JUDGMENT
BERTRAM RICE, Warden,	)	**PROPOSED**
Respondent.	)	

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice for the reasons set forth in the related Magistrate Judge's Report and Recommendation.

DATED: _____, _____

TERRY J. HATTER, JR.
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX G

LODGED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY MC DEPUTY

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEVEN MARTELL COLLINS,	Case No. CV 98-9329 TJH (AN)
Petitioner,	PROPOSED ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
v.	
BERTRAM RICE, Warden,	
Respondent.	

Pursuant to 28 U.S.C. § 636, the court has reviewed the file, including the Magistrate Judge's Report and recommendation, *de novo*.

IT IS ORDERED:

1. The Report and Recommendation is approved and adopted.

2. Judgment shall be entered dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order and the Judgment on all counsel or parties of record.

DATED: _____, _____

TERRY J. HATTER, JR.
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX H

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN MARTELL COLLINS, Defendant and Appellant.	B106939 (Super. Ct. No. YA028034)

COURT OF APPEAL-SECOND DIST.
FILED
DEC 12 1997
JOSEPH A. LANE Clerk
M.GAVINSKI Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew C. Kauffman, Judge. Affirmed.

Koryn & Koryn and Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, and Robert F. Katz, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Steven Martell Collins appeals the judgment entered after conviction by jury of possession of rock cocaine. (Health & Saf. Code, § 11350, subd. (a).) The

jury found Collins had two prior serious or violent felony convictions within the meaning of the Three Strikes Law, and three prior prison terms within the meaning of Penal Code Section 667.5, subdivision(b).[1] The trial court sentenced Collins to a term of 25 years to life in state prison.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution evidence.*

Viewed in accordance with the usual rule of appellate review (*People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Johnson* (1980) 26 Cal.3d 557, 575-577), the evidence established that on March 19, 1996, at approximately 1:40 a.m., sheriff's deputy Richard Schlegel made a traffic stop of a vehicle being drive by Collins on Normandie Avenue. A female passenger was in the front seat of the car with Collins. Schlegel discovered Collins had an outstanding warrant and arrested him. In a search pursuant to that arrest, Schlegel found a small zip-lock baggy containing .10 grams of cocaine in base form. Schlegel testified this is a usable amount consisting of approximately two doses.

Julie Ramirez, case records specialist for the Department of Corrections, testified the contents of Collins's section 969, subdivision (b), prison packet indicated Collins had been convicted of robbery and forcible rape in 1982, possession of a firearm by a felon in 1993, and that he had been sentenced to state prison on each case. Sheriff's deputy Larry Mitchell found Collins's fingerprints matched those contained in the prison packet.

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1. Subsequent unspecified statutory references to the Penal Code.

2. *Defense evidence.*

Collins testified in his own defense. Collins claimed he had just arrived in town and was on his way to visit his father when he saw the deputies for the first time. Collins looked at them but continued on his way. About twenty minute later, Collins saw Patricia Johnson on the street and offered her a ride. When the deputies stopped Collins, Schlegel took Collins's car keys and searched the vehicle. Schlegel search Collins thoroughly and took both of Collins's wallets to verify ownership of Collins's car Schlegel then searched the car and Collins again. Collins claimed Schlegel searched him a total of four times. Finally, Schlegel held up a small baggy, told Collins he was going to jail, "for this," and asked, "Is this yours?" Collins denied it was but Schlegel arrested him.

3. *Sentencing considerations.*

The jury convicted Collins of the underlying offense and found he had suffered two prior serious or violent felony convictions.

At the time of sentencing, the trial court noted Collins previously had sought an order striking the prior serious or violent felony convictions in the interests of justice but noted that motion had been ruled on prior to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court stated: "[H]owever, I do not see that this is an appropriate case for the court to exercise its discretion. [¶] . . . [A]lthough he was convicted in 1982 of the two prior strikes, he was mot recently discharged from parole for those very same convictions in June of 1992. And in July of 1993, he was rearrested for a subsequent felony and was on parole for that felony when this offense was committed."[2]

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2. The report of the probation officer prepared for

The trial court sentenced Collins to a third strike term of 25 years to life in state prison and struck the prior prison term enhancements because the trial court had "relied significantly on the existence of that prior prison term in determining whether or not to exercise . . . discretion in this case."

CONTENTIONS

Collins contends the trial court erroneously denied a *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277), the evidence showed only one prior serious or violent felony conviction, the term imposed constitutes cruel and unusual punishment, and the case must be remanded for an informed exercise of the trial court's *Romero* discretion.

DISCUSSION

1. *Collins was not denied a representative jury.*

a. *Background information.*

During voir dire, prospective juror no. 016 testified she lives in Inglewood, she is single, she had no children, no prior jury experience and she works as an automations clerk for the Federal Aviation Administration. Prospective juror no. 016 indicated no one close to her had ever been accused of narcotics related offenses, she had no reason to believe drug dealers were in her neighborhood and she thought

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sentencing in this case indicated Collins was convicted in 1982 of forcible rape and robbery and was sentenced to 14 years in state prison. Collins also was convicted of resisting arrest in 1991, and defrauding an innkeeper and possession of a firearm in 1993. Collins was sentenced to four years in state prison on the latter offense. He was paroled from Department of Corrections on September 26, 1995.

possession of rock cocaine should be against the law. Neither prospective juror no. 016 nor anyone close to her had ever had a problem with alcohol or drugs and prospective juror no. 016 had never been employed in law enforcement.

After the prosecutor had exercised peremptory challenges as to prospective jurors no. 019 and 016, both of whom were African-Americans, defense counsel objected. The trial court found a prima facie case of group bias had been established and asked the prosecutor to justify the peremptory challenges to the two prospective jurors.

The prosecutor responded both prospective jurors were "young and I was converned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remard when the judge made a response to her comment 'Uh-huh,' she turned away and rolled her eyes. [¶] I don't think you asked her specifically to give a yes or no, but she went 'yes' and rolled her eyes and turned away from the court. [¶] She and Mr. 006 [another prospective juror the prosecutor had excused] were both single, no ties."

As to prospective juror no. 019 the prosecutor stated, 'she also had a daughter having a drug problem and sh talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience."

The prosecutor noted two other African-Americans prospective jurors remained seated on the prospective jury.

The trial court stated it was "satisfied" with the prosecutor's stated reason for excusing prospective juror no. 019, "that being Ms. 019's experiences with a family member who had drug problem. [¶] With regard to [prospective juror no.] 016, the court, frankly did not observe the demeanor of

Ms. 016 that was complained of by the district attorney; however, Ms. 016 was youthful person, as was 006. And one or more other prospective jurors also. [¶] The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016. [¶] So the motion under the *wheeler* case is denied at this time; . . ."

b. *Collins's contention.*

Collins contends the trial court erroneously denied the *Wheeler* motion as to prospective juror no. 016. Collins argues the prosecutor claimed prospective juror no. 016 had been excused based on her age and her demeanor. However, because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective juror no. 016 based solely on her age.

Collins asserts age is an improper basis upon which to ground a peremptory challenge, the exclusion of a single juror of a cognizable class is sufficient to establish Wheeler error, and the trial court failed to engage in a sincere and reasoned attempt to evaluate the prosecutor's reason for excusing the prospective juror. (People v. Turner (1986) 42 Cal.3d 711, 715.) Collins claims the conviction must be reversed and the matter remanded for new trial.

c. *Applicable law.*

The use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates the state and federal Constitutions. (*People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (90 L.Ed.2d 69].)

If the trial court finds the defendant has established a prima facie case, the burden shifts to the prosecution to

provide "a race-neutral explanation related to the particular case to be tried" for the peremptory challenge. (*People v. Fuentes* (1991) 54 Cal.3d 707, 714; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) However, the explanation need not be sufficient to justify a challenge for cause. (*Batson v. Kentucky*, *supra*, at p. 97; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216.) Jurors may be excused based on ""hunches"" and even ''arbitrary'' exclusion is permissible, so long s the reasons are not based on impermissible group bias. (*People v. Turner*, *supra*, 8 Cal.4th at p. 165.)

There is a presumption a prosecutor uses peremptory challenges in a constitutional manner. (*People v. Clair* (1992) 2 Cal.4th 629, 652.) We give great deference to the trial court in distinguishing bona fide reasons from sham excuses. (*People v. Fuentes, supra*, 54 Cal.3d at p. 714; *People v. Wheeler, supra*, 22 Cal.3d at p. 282.0

d. *Application here.*

Regarding prospective juror no. 016's youth, we reject Collins's invitation to find the young a cognizable group within the meaning of the representative cross-section rule. As Collins concedes, there is no case law to support the proposition the young are a cognizable class for the purposes of a *Wheeler* motion. Rather, numerous courts have expressly declined to recognize age as a factor that defines a cognizable group. (See, e.g., *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1153 [Young people do not constitute a cognizable class] disapproved on other grounds in *People v. Davis* (1994) 7 Cal.4th 797, 805-810; *People v. McGhee* (1987) 193 Cal.App.3d 1333, 1351-1352; *People v. Marbley* (1986) 181 Cal.App.3d 45, 47-48; *People v. Parras* (1984) 159 Cal.App.3d 875 877; *People v. Estrada* (1979) 93 Cal.App.3d 76, 93; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1061.) Moreover, peremptory challenges to youthful and/or immature prospective juror repeatedly have

been upheld as proper. (See, e.g., *People v. Sims* (1993) 5 Cal.4th 405, 430.)

Thus, we find no merit to Collins's assertion prospective juror no. 016 improperly was excluded from the jury based on her age.

Additionally, even if the prosecutor's reliance on prospective juror no. 016's youth were improper, the prosecutor also stated the prospective juror had rolled her eyes and turned away from the trial court when the trial court spoke to the prospective juror. The trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt.

Based on this evidence, the prosecutor's use of a peremptory challenge as to prospective juror no. 016 was proper. It is well settled that peremptory challenges may be based on a prospective juror's body language or manner of answering questions. (*People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Fuentes, supra*, 54 Cal.3d at p. 715 ["[N]othing in *Wheeler* disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case, . . ."]; *People v. Johnson, supra*, 47 Cal.3d at pp. 1219, 1220.) Because the prosecutor reasonably could have interpreted prospective juror no. 016's body language as indicative of hostility or disrespect, a peremptory challenge exercised on that basis was not improper.

Collin's assertion the trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's justifications also fails. Absent a showing by the defendant to the contrary, we "rely on the good judgment of the trial [court]" to evaluate whether the prosecutor's reasons were bona fide. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282.) Because nothing in the present record, including the trial court's

decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference on appeal. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1198.)

For all the foregoing reasons, we conclude the trial court did not abuse its discretion in denying Collins's *Wheeler* motion

2. *Prior serious or violent felony convictions need not be brought and tried separately.*

Collins contends his prior convictions of robber and forcible rape both were incurred in a single prior proceedings and thus constitute a single prior serious or violent felony conviction.

This claim is meritless. The Three Strikes law does not require otherwise qualifying prior convictions to be based on charges brought and tried separately. (*People v. Fuhrman*(1997) 16 Cal.4th 930, 938-939; *People v. Allison* (1995) 41 Cal.App.4th 841, 844-845.) Thus, both of Collins's prior convictions properly constituted strikes.

3. *The sentence of 25 years to life for possession of rock cocaine with prior convictions of forcible rape and robbery is not cruel and unusual or unconstitutionally disproportionate.*

Collins contends the term imposed is cruel and unusual punishment, disproportionate to the crime for which it is imposed and to Collins's individual culpability, and it is excessive when compared to the punishment imposed for more serious offenses in this jurisdiction and when compared to the punishment imposed for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal3d 410, 423-424; *People v. Dillon* (1983) 34 Cal.3d 441, 477-478; *Solem v.*

Helm (1983) 463 U.S. 277, 286-288 [77 L.Ed.2d 637].) Collins asserts his current offense consisted of possession of .10 grams of rock cocaine. His prior convictions were incurred "in 'one swing' in 1982," when Collins was 21 years of age and he will not be eligible for parole until he has served 25 years. An individual convicted of first degree murder with a firearm is eligible for parole sooner. Collins concludes the penalty must be reduced.

We disagree.

A severe punishment is merited herein based on Collins's prior serious or violent felonies convictions and his status as a repeat offender. In light of Collins's individual circumstances and criminal history, the term is not grossly disproportionate to the current offense and does not constitute cruel and unusual punishment in violation of the Eighth Amendment. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965 [115 L.Ed.2d 836]; *Rummel v. Estell* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382].) Nor is the punishment "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra*, 8 Cl.3d at p.424; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1195-1198.)

Thus, the term is not cruel or unusual under either the federal or state constitutions.

4. *This case need not be remanded under Romero.*

Collins contends the case must be remanded because the trial court failed adequately to consider all the relevant criteria under *People v. Superior Court (Romero)*, supra, 13 Cal.4th at pages 530-531, at the time of sentencing. Collins asserts the trial court only looked at his criminal history, failed to consider the circumstances of the commission of the

current felony, and failed to make an individualized assessment based on the circumstances of this case and the offender. (*Id.*, at p. 531.) Collins asserts both of the overlooked factors were relevant because of the small amount of contraband involved in this case and the fact both his prior convictions were incurred in a single proceeding 14 years before the current offense. Collins claims the case must be remanded because it is unclear how the trial court would have exercised its informed discretion.

This claim lacks merit.

If a trial court fails to set forth its reasons in the minutes for striking a prior conviction allegation under section 1385, the order is ineffective. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 532; *People v. Price* (1986) 184 Cal.App.3d 1405, 1410.) However, there is no requirement the trial court support its refusal to exercise its discretion under section 1385 on the record by expressly considering every relevant factor on the record. Rather, under *Romero*, the trial court need only demonstrate awareness of its discretion. Thereafter, we review the trial court's action for an abuse of discretion. Such an abuse is found only where the trial court's sentencing choice is "arbitrary or capricious or '"exceeds the bounds of reason, all of the circumstances being considered."' [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 234; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Here, the trial court expressly referred to the *Romero* decision and declined to exercise its discretion to strike either of Collins's prior convictions based on his criminal history. No abuse of the trial court's discretion appears. Accordingly, this case need not be remanded for resentencing.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

APPENDIX I

SPECIAL AGENT IN THE AIR FORCE SPECIAL INVESTIGATIONS.

THE COURT: IS THIS SOMETHING THAT YOU CAN TALK ABOUT?

PROSPECTIVE JUROR 012: IT IS EQUIVALENT TO THE FEDERAL BUREAU OF INVESTIGATION.

THE COURT: I TAKE IT FROM TIME TO TIME, YOU DID INVOLVE YOURSELF IN CRIMINAL INVESTIGATIONS?

PROSPECTIVE JUROR 012: I DID.

THE COURT: DID YOU EVER HAVE TO TESTIFY AS A WITNESS IN REGARD TO ANY OF YOUR INVESTIGATIONS?

PROSPECTIVE JUROR 012: YES.

THE COURT: MORE THAN ONCE?

PROSPECTIVE JUROR 012: TOTAL TIME, TWICE – I'M SORRY – THREE TIMES.

THE COURT: DID YOU DEVELOP A CLOSE WORKING RELATIONSHIP WITH ANY OTHER FEDERAL LAW ENFORCEMENT AGENTS?

PROSPECTIVE JUROR 012: YES.

THE COURT: DO YOU THINK THERE WAS ANYTHING ABOUT ANY OF YOUR EXPERIENCES, MR. 012, THAT MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 012: NO.

THE COURT: TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE?

PROSPECTIVE JUROR 012: I WOULD BE FAIR AND IMPARTIAL.

THE COURT: MR. 003.

PROSPECTIVE JUROR 003: AS A SERGEANT IN EUROPE, I USED TO ESCORT PRISONERS.

THE COURT: WERE YOU IN THE MILITARY POLICE?

PROSPECTIVE JUROR 003: NO. AS A SERGEANT, THAT IS ONE OF OUR DUTIES, TO ESCORT PRISONERS BACK AND FORTH TO THE PRISON, TO BRING THEM BACK TO THE CITY FOR TESTIMONY.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT ANY OF YOUR EXPERIENCES IN THAT REGARD THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 003: NO.

THE COURT: THANK YOU, 003.

DO ANY OF YOU HAVE ANY RELATIVES OR CLOSE FRIENDS THAT ARE NOW OR HAVE BEEN EMPLOYED IN ANY LAW ENFORCEMENT CAPACITY, AS FAR AS YOU KNOW?

PROSPECTIVE JUROR 007: I HAVE A FRIEND WHO IS A LONG BEACH POLICE OFFICER.

THE COURT: IS THIS A CLOSE FRIEND?

PROSPECTIVE JUROR 007: PRETTY CLOSE.

THE COURT: HAVE YOU EVER TALKED TO THIS FRIEND ABOUT ANY DUTIES OR EXPERIENCES?

PROSPECTIVE JUROR 007: NOT ON WHAT HE – I JUST KNOW THAT HE IS A POLICE OFFICER. I DON'T KNOW WHAT HE REALLY, YOU KNOW, ABOUT WHAT HE DOES DURING THE DAY OR IN GENERAL WHAT HE DOES.

THE COURT: BUT DO YOU THINK THERE IS ANYTHING THAT THE TWO OF YOU TALKED ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 007: NO.

THE COURT: OR AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF POLICE OFFICER?

PROSPECTIVE JUROR 007: NO.

THE COURT: 014.

PROSPECTIVE JUROR 014: MY BROTHER USED TO BE A POLICEMAN FOR COSTA MESA. HE IS NO LONGER WITH THEM.

I ALSO KNOW A COUPLE OF ATTORNEYS, POLICE OFFICERS, AS FRIENDS.

THE COURT: HAVE EVER TALKED TO ANY OF THESE PEOPLE ABOUT ANY OF THEIR PROFESSIONAL DUTIES OR RESPONSIBILITIES?

PROSPECTIVE JUROR 014: YES.

THE COURT: DO YOU THINK THERE IS ANYTHING THAT YOU HAVE TALKED TO THEM ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE OR THAT MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 014: NO.

THE COURT: NOW, POSSESSION OF DRUGS IS SOMETIMES REFERRED TO AS A VICTIMLESS CRIME; YOU ARE NOT GOING TO HEAR ANY TESTIMONY IN THIS CASE ABOUT ANYBODY BEING SHOT, STABBED; NOBODY HAD ANY PROPERTY TAKEN FROM THEM; AS A CONSEQUENCE, THERE ARE PEOPLE THAT RE OF THE VIEW THAT A FAR AS THIS TYPE OF CHARGE IS CONCERNED, THAT THIS TYPE OF CONDUCT REALLY SHOULD NOT BE AGAINST THE LAW; DO ANY OF YOU THAT WAY?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU THINK THAT THE POLICE ARE WASTING THEIR TIME ENFORCING THIS TYPE OF LAW THEY HAVE MORE IMPORTANT THINGS TO DO?

(THE PROSPECT JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: LET'S CALL TWO OTHER NAMES, PLEASE.

THE CLERK: JUROR NO. 1, 016.

JUROR NO. 10, 017.

THE COURT: GOOD AFTERNOON, MS. 016.

GOOD AFTERNOON, MS. 017.

MS. 016, HAVE YOU BEEN ABLE TO HEAR ALL OF THE QUESTIONS THAT I HAVE ASKED THUS FAR?

PROSPECTIVE JUROR 016: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME QUESTIONS I HAVE ASKED THE OTHER PROSPECTIVE JURORS OR SUBSTANTIALLY SIMILAR ONES, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THEM HAVE?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, 017?

PROSPECTIVE JUROR 017: NOT AS TO ANYTHING YOU ASKED SO FAR.

THE COURT: DO YOU KNOW ANYTHING ABOUT THIS CASE, MS. 016, OTHER THAN WHAT YOU HAVE PICKED UP FROM SITTING IN THE AUDIENCE TODAY?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, MS. 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU KNOW ANYBODY THAT HAS BEEN IDENTIFIED AT COUNSEL TABLE, MS. 016?

PROSPECTIVE JUROR 016: NO.

THE COURT: 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: IS THERE ANYTHING ABOUT THE NATURE OF THE CHARGE OF POSSESSION OF ROCK COCAINE, MS. 016, THAT MIGHT MAKE IT DIFFICULT FOR YOU TO SIT ON THIS CASE?

PROSPECTIVE JUROR 016: NO.

THE COURT: 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: WOULD YOU BE ABLE TO STAY WITH US THROUGH THE END OF WEEK, 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: WOULD YOU BE ABLE TO DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: MS. 016, WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 016: MY NAME IS 016. I LIVE IN INGLEWOOD. I AM SINGLE. I HAVE NO CHILDREN. I AM AN AUTOMATIONS CLERK FOR THE FEDERAL AVIATION ADMINISTRATION.

I HAVE NO PRIOR JURY EXPERIENCE.

PROSPECTIVE JUROR 017: MY NAME IS 017. I LIVE IN TORRANCE. I AM MARRIED. I HAVE TWO GROWN CHILDREN LIVING IN REDDING.

MY HUSBAND IS A RETIRED SHEET METAL MECHANIC AND I AM A HOUSEWIFE.

I HAVE BEEN ON TWO DRUNK DRIVING AND ONE MALPRACTICE SUIT.

THE COURT: AS FAR AS THE TWO DUI CASES WERE CONCERNED, WAS THE JURY ABLE TO REACH VERDICTS, MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF THOSE THREE OTHER CASES?

PROSPECTIVE JUROR 017: YES.

THE COURT: ARE YOUR TWO CHILDREN IN REDDING WORKING?

PROSPECTIVE JUROR 017: MY ONE SON IS A ROOF AND GUTTER CONTRACTOR. AND MY OTHER SON WORKS FOR HIM.

THE COURT: MS. 016, WITH REGARD TO THE VARIOUS QUESTIONS THAT I ASKED ABOUT DRUGS, AND DRUG USAGE, IS THERE ANYONE CLOSE TO YOU THAT HAS EVER BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, 017?

PROSPECTIVE JUROR 017: I THINK MY OLDEST SON HAD A DRUNK DRIVING YEARS AGO.

THE COURT: DID HE EVER DISCUSS THE INCIDENT WITH YOU?

PROSPECTIVE JUROR 017: NO.

THE COURT: IS THERE ANYTHING ABOUT

THAT EXPERIENCE THAT MIGHT AFFECT YOU ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS IN YOUR NEIGHBORHOOD, MS. 016?

PROSPECTIVE JUROR 016: NO.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: DO YOU, MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: HAVE YOU YOURSELF OR ANYONE CLOSE TO YOU, MS. 016, THAT HAS EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 016: NO.

THE COURT: HOW ABOUT YOU, MS. 017?

PROSPECT JUROR 017: OUTSIDE OF MY SON HAVE THAT ONE DUI, I DON'T THINK HE DRINKS NOW AND DRIVES.

THE COURT: MS. 016, HAVE YOU EVER BEEN EMPLOYED IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 016: NO.

THE COURT: HAS ANYONE CLOSE TO YOU?

PROSPECTIVE JUROR 016: NO.

THE COURT: MS. 017, HAVE YOU?

PROSPECTIVE JUROR 017: NO.

THE COURT: ANYONE CLOSE TO YOU THAT HAS?

PROSPECTIVE JUROR 017: NO.

THE COURT: AS FAR ALL 12 OF YOU ARE CONCERNED, LADIES AND GENTLEMEN, CAN ANY OF YOU THINK OF ANY REASON YOU COULD NOT BE FAIR AND IMPARTIAL JURORS IN THIS CASE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: COUNSEL, APPROACH THE BENCH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: MS. NACHMAN, DO YOU HAVE ANY ADDITIONAL QUESTIONS FOR CAUSE?

MS. NACHMAN: THE COURT DIDN'T MENTION WHETHER OR NOT THEY HAVE PRIORS, STARTING

WITH MS. 001 UNTIL WE GOT TO MS. 004, OTHER PRIOR JURY EXPERIENCE. I THINK THEY WERE OVERLOOKING IT.

THE COURT: DO YOU OTHERWISE PASS FOR CAUSE?

MS NACHMAN: YES.

THE COURT: MS. SATRIANO?

MS. SATRIANO: I WAS GOING TO ASK HAS ANYBODY BEEN ARRESTED FOR ANY CRIME OR HAVE ANY EXPERIENCE WITH LAW ENFORCEMENT GOOD OR BAD.

THE COURT: WELL, I ALREADY ASKED ABOUT EXPERIENCES WITH LAW ENFORCEMENT. I AM NOT GOING TO ASK WHETHER THEY HAVE BEEN ARRESTED FOR ANYTHING.

MS. SATRIANO: I MEANT IN RELATION TO THE – THEY HAVE BEEN ASKED ABOUT LAW ENFORCEMENT IN GENERAL OR JUST THAT THEY KNEW ANYBODY. I DIDN'T HEAR THE QUESTION.

THE COURT: I THINK I ASKED THAT.

ALL RIGHT.

MS. SATRIANO: I MISSED THAT.

I DON'T KNOW IF THE DISTINCTION BETWEEN CIVIL AND THE BURDEN OF PROOF, BECAUSE WE HAVE ONE LADY THAT HAS SERVED ON A CIVIL JURY.

THE COURT: WELL, DIDN'T I TALK TO THEM ABOUT THE BURDEN OF PROOF?

MS. SATRIANO: YES.

THE COURT: ANY OTHER QUESTIONS?

MS. SATRIANO: WERE THERE ANY OF THEM THAT HAVE BEEN VICTIMS OF CRIME AND WHAT KINDS OF EXPERIENCES THEY HAVE IN RELATION TO THAT?

THE COURT: I AM NOT GOING TO ASK THAT.

ARE THERE ANY OTHER QUESTIONS?

MS. SATRIANO: JUROR NO. 8 SAID THAT SHE HAD DOUBTS THAT SHE COULD BE IMPARTIAL AND YOU ASKED WHETHER SHE COULD LISTEN TO THE EVIDENCE. AFTER THAT, THAT WAS THE ONLY FOLLOWUP QUESTION. I DON'T KNOW THAT SHE EXPLAINED WHY SHE HAD DOUBTS AS TO WHETHER SHE COULD BE IMPARTIAL.

MS. :NACHMAN: SHE DID SAY SHE COULD LISTEN TO THE EVIDENCE OBJECTIVELY.

THE COURT: I WILL NOT ASK ANY ADDITIONAL QUESTIONS OF MS. 008 IN THAT AREA.

DO YOU PASS FOR CAUSE?

MS. SATRIANO: PASS FOR CAUSE

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE

JURY AS FOLLOWS:)

THE COURT: MS 002. DID YOU TELL US WHETHER YOU HAD BEEN ON A JURY BEFORE?

PROSPECTIVE JUROR 002: YES, I DID.

I HAVE NEVER BEEN ON A JURY BEFORE.

THE COURT: MR. 003. WHAT ABOUT YOU?

PROSPECTIVE JUROR 003: NO

THE COURT: THE FIRST PEREMPTORY CHALLENGE THEN IS WITH THE PEOPLE.

MS. SANTRIANO: THANK AND EXCUSE JUROR NO. 8.

the court; 008, THANK YOU FOR YOUR SERVICE. YOU ARE EXCUSED.

THE CLERK: 018.

THE COURT: GOOD AFTERNOON, 018. HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 018: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME OR SUBSTANTIALLY SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 018: NO, I WOULDN'T.

THE COURT: AND CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 018: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION THERE ON THE BOARD?

PROSPECTIVE JUROR 018: MY NAME IS 018. I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH THREE GROWN CHILDREN.

I WAS FORMERLY A TEACH; I AM NOW AT HOME.

MY HUSBAND IS A PHYSICIAN. HE IS THE HEAD OF THE TRAINING PROGRAM FOR INTERNS AND RESIDENTS.

I HAVE HAD NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 018: YES.

THE COURT: COULD YOU DECIDE THIS SOLELY ON THE EVIDENCE AND INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 018: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 018: NO.

THE COURT: HAVE YOU EVER HAD AN

EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 018: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 018: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 018: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 018: NO.

THE COURT: THANK YOU, 018.

MS. NACHMAN, DO YOU PASS FOR CAUSE AS TO 018?

MS. NACHMAN: YES, BUT I DON'T BELIEVE – MAYBE I DIDN'T HEAR IT, WHAT HER GROWN CHILDREN DID.

PROSPECTIVE JUROR 018: OUR SON IS AN INTERN IN MEDICINE IN NORTHERN CALIFORNIA.

WE HAVE ONE DAUGHTER WHO IS

LOOKING FOR A JOB AFTER GETTING HER MASTERS DEGREE AND THE THIRD ONE IS JUST GOING BACK TO SCHOOL TO GET A BS DEGREE IN COLORADO.

THE COURT: WHAT WAS IT THAT YOU FORMERLY TAUGHT?

PROSPECTIVE JUROR 018: ENGLISH.

THE COURT: AND AT THE JUNIOR HIGH SCHOOL OR HIGH SCHOOL LEVEL?

PROSPECTIVE JUROR 018: JUNIOR HIGH.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 12, YOUR HONOR.

THE COURT THANK YOU, 012. YOU ARE EXCUSED.

THE CLERK: 019.

THE COURT: GOOD AFTERNOON, 019.
HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 019: YES.

THE COURT: IF I WAS TO ASK YOU THE SAME OR SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER THEM ANY DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 019: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 019: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 019: MY NAME IS 019. I LIVE IN INGLEWOOD. I AM SINGLE, RETIRED. I HAVE SEVEN KIDS.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: WHAT WAS YOUR OCCUPATION BEFORE YOU RETIRED?

PROSPECTIVE JUROR 019: A NURSE.

THE COURT: AND ARE YOUR CHILDREN WORKING?

PROSPECTIVE JUROR 019: YES.

THE COURT: CAN YOU GIVE US THEIR OCCUPATIONS, PLEASE?

PROSPECTIVE JUROR 019: THE OLDEST ONE IS A COMPUTER MANAGER FOR A COMPANY IN VAN NUYS.

ANOTHER ONE IS A CLINICAL SOCIAL WORKER, WORKS FOR HERSELF NOW.

ONE SON HAS HIS OWN MECHANIC SHOP; ONE DOES NOT WORK. THE OTHER ONE IS IN ARIZONA WORKING FOR MCDONNELL DOUGLAS.

THE YOUNGEST IS AT HOME WITH FIVE KIDS.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 019: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WA PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 019: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUGS OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 019: MY YOUNGEST DAUGHTER HAD A PROBLEM WITH DRUGS.

THE COURT: WHAT KINDS OF DRUGS?

PROSPECTIVE JUROR 019: I HAVE NO IDEA.

THE COURT: HOW DID YOU FIND OUT ABOUT THE PROBLEM?

PROSPECTIVE JUROR 019: I WAS INVOLVED IN IT. I HAD TO HELP HER. SHE IS THE ONE WITH THE KIDS.

I THINK IT WAS COCAINE.

THE COURT: WAS IT ROCK COCAINE?

PROSPECTIVE JUROR 019: NO.

THE COURT: HOW LONG AGO DID THAT HAPPEN?

PROSPECTIVE JUROR 019: SHE IS TWO YEARS CLEAN.

THE COURT: WAS THERE EVER A TIME WHEN SHE WAS ARRESTED AND ACCUSED OF COMMITTING SOME CRIME THAT INVOLVED THE USE OF DRUGS?

PROSPECTIVE JUROR 019: NO, I DON'T THINK SO.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR DAUGHTER OR WHAT SHE HAS GONE THROUGH RECENTLY THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 019: NO, I DON'T THINK SO.

THE COURT: YOU CAN PUT THAT ASIDE AND BE AS OBJECTIVE AS ANY OTHER JURORS?

PROSPECTIVE JUROR 019: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THERE ARE DRUG DEALERS ACTIVE IN

YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 019: I HAVE NO REASON TO BELIEVE THAT.

THE COURT: THANK YOU, MS. 019.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO PLEASE THANK AND EXCUSE JUROR NO. 6.

THE COURT: THANK YOU, MR. 006. YOU ARE EXCUSED.

THE CLERK: 020.

THE COURT: GOOD AFTERNOON, 020. HAVE YOU HEARD THE QUESTIONS?

PROSPECTIVE JUROR 020: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME OR SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY OF THEM DIFFERENTLY

THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 020: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 020: YES, I CAN.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 020: MY NAME IS 020. I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH TWO GROWN CHILDREN. I AM AN ACCOUNTANT.

I HAVE HAD NO MILITARY EXPERIENCE.

MY HUSBAND IS AN ENGINEER AND MY OLDEST DAUGHTER IS A MANGER FOR TRW.

MY SON IS IN COLLEGE.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU THINK THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF.

PROSPECTIVE JUROR 020: YES, I DO.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 020: YES, I CAN.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 020: NO, I DON'T.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WA PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 020: NO, I HAVEN'T.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUGS OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 020: NO, NOBODY HAS.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 020: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 020: YES.

THE COURT: THANK YOU, 020.

MKS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: MAY I HAVE A MOMENT?

THE COURT: YES.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THAN AND EXCUSE JUROR NO. 7.

THE COURT: THANK YOU, MS. 007 FOR YOUR SERVICE. YOU ARE EXCUSED.

THE CLERK: 021.

THE COURT: MS. 021, HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 021: YES, SIR.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS?

PROSPECTIVE JUROR 021: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 021: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 021: MY NAME IS 021. I

LIVE IN CARSON. I AM MARRIED WITH TWO SMALL CHILDREN. I AM A CUSTOMER SUPPORT SPECIALIST FOR A MAIL COMPANY.

MY HUSBAND WSA PREVIOUSLY IN THE AIR FORCE WORKING ON THE SPACESHUTTLE. HE IS NOW AN ANALYST FOR A COMPANY THAT WORKS FOR THE DEPARTMENT OF DEFENSE.

I HAVE HAD A MURDER TRIAL AND A BURGLARY TRIAL.

THE COURT: WERE THE JURIES ABLE TO REACH VERDICTS?

PROSPECTIVE JUROR 021: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THIN YOU COULD DECIDE THIS CASE INDEPENDENTLY OF THOSE OTHER TWO CASES?

PROSPECTIVE JUROR 021: YES.

THE COURT: DO YOU HAVE ANY FRIENDS OR RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 021: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 021: NO.

THE COURT: HAVE YU OR ANYONE CLOSE TO YOU HAD A PROBLEM WITH DRUG OR ALCOHOL

ABUSE?

PROSPECTIVE JUROR 021: MY IN-LAWS DO DRUGS. I DON'T KNOW IF THEY DO RECENTLY OR NOT. THEY LIVE IN ANOTHER STATE. THEY HAVE BEEN INVOLVED IN THAT.

THE COURT: WHAT TYPE OF DRUG IS THAT?

PROSPECTIVE JUROR 021: AS FAR AS I KNOW, IT IS MARIJUANA. THERE MAY BE MORE THAN THAT. I AM NOT SURE.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR IN-LAWS OR ANY OF THEIR HABITS THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE?

PROSPECTIVE JUROR 021: NO.

THE COURT: DO YOU THINK THE POSSESSION OF COCAINE OR ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 0021: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 021: NO.

THE COURT: THANK YOU, 021.
MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR

HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO PLEASE THANK AND EXCUSE JUROR 16.

THE COURT: THANK YOU, MS. 016. YOUR ARE EXCUSED.

THE CLERK: 022.

THE COURT: GOOD AFTERNOON, 022.
HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 022: YES, I HAVE.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 022: YES. ABOUT A PARTICULAR LY POSITIVE OR PARTICULARLY NEGATIVE INCIDENT WITH POLICE OFFICER, I THINK I HAVE HAD BOTH.

THE COURT: DO YOU THINK THAT ANY OF THOSE EXPERIENCES, BE THEY POSITIVE OR NEGATIVE, MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 022: NO, I DO NOT.

THE COURT: ARE THERE ANY QUESTIONS THAT YOU WOULD HAVE ANSWERED DIFFERENTLY:

PROSPECTIVE JUROR 022: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 022: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 022: MY NAME IS 022. I LIVE IN REDONDO BEACH. I AM DIVORCED, NO CHILDREN. I AM SELF-EMPLOYED IN THE READY-MIX CONCRETE BUSINESS.
MY EX IS UNEMPLOYED.
I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 022: NO, I DON'T.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 022: YES, A COUSIN, BROTHER ALCOHOL.

THE COURT: BOTH?

PROSPECTIVE JUROR 022: YES.

THE COURT: AS FAR AS YOU KNOW, HAVE THEY BEEN ACCUSED OF COMMITTING ANY CRIME AT A TIME WHEN THEY WERE UNDER THE INFLUENCE OF ALCOHOL?

PROSPECTIVE JUROR 022: NO, THEY HAVE NOT.

THE COURT: IS THERE ANYTHING ABOUT ANY OF YOUR EXPERIENCES WITH EITHER OF THEM OR YOUR RELATIONSHIP THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 022: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 022: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 022: NO.

THE COURT: THANK YOU, 022.
MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE

DEFENSE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE 021.

THE COURT: THANK YOU FOR YOUR SERVICE, 021. YOU ARE EXCUSED.

THE CLERK: 023.

THE COURT: GOOD AFTERNOON, 023.

HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 023: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTIONS DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 023: YES, YOUR HONOR.
I HAVE A PERSONAL FEELING ABOUT THE SUBJECT MATTER OF DRUGS THAT LEADS ME TO BELIEVE THAT I COULDN'T BE IMPARTIAL AS A JUROR IN THIS CASE.

THE COURT: I APPRECIATE YOUR LETTING US KNOW THAT, SIR.
YOU ARE EXCUSED.

THE CLERK: 024.

THE COURT: GOOD AFTERNOON, 024.
HAVE YOU HEARD THE QUESTIONS?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS?

PROSPECTIVE JUROR 024: YES.

I'M GOING OUT OF TOWN FOR A WEDDING THURSDAY NIGHT. SO I WILL NOT BE HERE FRIDAY.

THE COURT: WELL, WE ARE GOING TO TAKE AN ALTERNATE: SO IF WE HAVE TO, WE'LL JUST LET YOU GO.

ARE THERE ANY OTHER QUESTIONS THAT YOU WOULD HAVE ANSWERED DIFFERENTLY:

PROSPECTIVE JUROR 024: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 024: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 024: MY NAME IS 024. I LIVE IN HERMOSA BEACH. I AM SINGLE; CURRENTLY I AM A HIGH SCHOOL TEACHER AND BEFORE THAT, I WORKED AS AN ACCOUNTANT AT A BIG ACCOUNTING FIRM AND I DO NOT HAVE ANY PRIOR JURY EXPERIENCE.

THE COURT: WHAT SUBJECT MATTER DO YOU TEACH?

PROSPECTIVE JUROR 024: HISTORY AND ECONOMICS NEXT YEAR.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 024: YES.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 024: NO.

THE COURT: HAVE YOU EVER HAD ANY EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 024: NO.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 024: NO.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OF OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 024: NO.

THE COURT: DO YOU THINK THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE IS DRUG DEALING GOING ON IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 024: NO.

THE COURT: THANK YOU, 024.

MS. NACHMAN: MAY WE APPROACH?

(THE FOLLOWING PROCEEDINGS WERE AT THE BENCH:)

MS. NACHMAN: I HAVE A CONCERN ABOUT MS. 024 HAVING TO LEAVE TOWN THURSDAY NIGHT FOR A WEDDING.

I WON'T BE AVAILABLE MYSELF UNTIL 10:30. ALSO I AM SUPPOSED TO BE DOWNTOWN AT CCB FOR A SENTENCING THURSDAY MORNING. IF NEED BE, I CAN GET THAT CONTINUED OR HAVE SOMEONE STAND IN FOR ME.

I AM WONDERING ABOUT THE TIME CRUNCH. I HAVE TO BE FINISHED WITH THIS TRIAL BY FRIDAY. SO THE FACT THAT SHE IS GOING TO BE OUT OF TOWN BOTHERS ME.

ALSO, ON 022 –

THE COURT: WELL, WAIT A MINUTE. YOU ALREADY PASSED FOR CAUSE ON MR. 022.

NOW, AS FAR AS 024 IS CONCERNED –

MS. NACHMAN: CERTAINLY, IT MAY WELL BE THAT THEY MAY BE DELIBERATING AT THAT POINT. SHE SAYS SHE IS LEAVING TOWN.

THE COURT: DO YOU STIPULATE MS. 024 BE EXCUSED?

MS. SATRIANO: SO STIPULATED, YOUR HONOR.

MS. NACHMAN: SO STIPULATED, YOUR HONOR.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE COURT: MS. 024, OUT OF AN ABUNDANCE OF CAUTION, I AM GOING TO EXCUSE YOU.

THANK YOU.

THE CLERK: 025.

PROSPECTIVE JUROR 025: CAN I HAVE A SIDE BAR?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

PROSPECTIVE JUROR 025: MY WIFE IS APPARENTLY BEING TREATED FOR CRACK AND MY FAMILY IS COMPLETELY DESTROYED OVER THIS. I DON'T THINK I CAN BE IMPARTIAL.

THANK YOU.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE CLERK: 026.

THE COURT: GOOD AFTERNOON, MS. 026. HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 026: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 026: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 026: MY NAME IS 026. I LIVE IN LOMITA. I AM MARRIED; TWO GROWN CHILDREN. ONE IS A NURSE IN BAKERSFIELD AT KAISER HOSPITAL; THE OTHER ONE, MY SON, IS IN THE MUSIC BUSINESS. AND I WORKED FOR TRW. I HAVE BEEN RETIRED FOR 11 YEARS.

I HAVE HAD JURY EXPERIENCE.

THE COURT: HOW MANY DIFFERENT

CRIMINAL CASES, IF ANY?

PROSPECTIVE JUROR 026: TWO.

THE COURT: AND THE CHARGES IN THOSE CASES?

PROSPECTIVE JUROR 026: ONE WAS AGAINST THE CITY OF INGLEWOOD, DRUGS. AND THE OTHER WAS DRUNK DRIVING.

THE COURT: WAS THE JURY IN EACH OF THOSE CASES ABLE TO REACH A VERDICT?

PROSPECTIVE JUROR 026: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF ALL OF YOUR PREVIOUS JURY EXPERIENCES?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 026: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 026: NO.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG

OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 026: NOT TO MY KNOWLEDGE.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 026: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 026: NO.

THE COURT: MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES YOUR HONOR. PASS FOR CAUSE.

THE COURT: THE PEREMPTORY IS WITH THE

PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO, PLEASE, THANK AND EXCUSE 019.

THE COURT: THANK YOU MS. 019. FOR YOUR SERVICES. YOU ARE EXCUSED.

MS. NACHMAN: MAY WE APPROACH?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

(THE FOLLOWING PAGES, 66 THROUGH 72, ARE PROCEEDINGS HELD PURSUANT TO A WHEELER MOTION AND ORDERED SEALED BY THE COURT.)

APPENDIX J

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE, CALIFORNIA,	) Case No. 2 CRIM B106939) (Sup. Ct. No. YA028034
Plaintiff and Respondent,	)
vs.	)
BERTRAM RICE, Warden,	)
Defendant and Appellant.	)

Appeal From the Superior Court of Los Angeles County
Honorable Andrew C. Kauffman, Judge Presiding

APPELLANT'S OPENING BRIEF

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE, CALIFORNIA,	) Case No. 2 CRIM B106939) (Sup. Ct. No. YA028034
Plaintiff and Respondent,	)
vs.	)
BERTRAM RICE, Warden,	)
Defendant and Appellant.	)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a judgment that finally disposes of all issues between the parties, and is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

On April 18, 1996, appellant, Steven M. Collins, was charged in an information with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in count I, and driving without a license (Veh. Code, § 12500, subd. (a)), misdemeanor, in count II. (C.T. 14-15.) It was further alleged that appellant had suffered two prior serious or violent "strike" convictions (Pen. Code, §§ 667, subds. (b) - (i), 1170. 12, subds. (a) - (d)), and had served three prior prison terms (Pen.

Code, § 667.5, subd. (b)). (C.T. 15-16)[1/] At his arraignment on that same date, appellant pled not guilty and denied the prior allegations. (C.T. 18.)

On August 26, 1996, prior to the start of trial, appellant's motions to dismiss his strike priors under Penal Code section 1385, on "brought and tried separately" grounds, and on cruel and unusual punishment grounds, were heard and denied. (C.T. 52.)

On August 26, 1996, during the first day of jury selection, appellant's Wheeler[2/] motion was heard and denied. (C.T. 53.) Additionally, count II (Veh. Code, § 12500, subd. (a)) was dismissed on the People's motion in furtherance of justice. (C.T. 53.)

On August 29, 1996, following a four-day jury trial, appellant was convicted as charged with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (A)). (C.T. 108, 111.) The jury also found true the allegations that appellant had suffered two prior serious or violent "strike" convictions (Pen. Code, §§ 667, subds. (b) - (i), 1170.12, subds. (a) - (d)), and had served three prior prison terms (Pen. Code, §667.5, subd. (b)). (C.T. 109-110, 112-113.)

On October 10, 1996, the court denied appellant's motion to dismiss a strike prior under Penal Code section 1385, motion to dismiss on "brought and tried separately" grounds, and motion to dismiss on cruel and unusual punishment grounds. (C.T. 120.) Thereafter, the court sentences appellant to 25 years to life, and struck punishment on the prison priors. (C.T. 120.) Additionally, the court ordered appellant to pay a $200 restitution fine pursuant to Penal Code section 1202.4, subdivision (b). (C.T. 120.) Appellant was given credit for 308 days spent in custody, including 206 actual days and 102

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1. It was alleged that appellant was convicted of robbery (Pen. Code, § 211) and forcible rape (Pen. Code, §261, subd. (2)) on January 25, 1982, in Case No. A199738. (C.T. 15.)

2. People v. Wheeler (1978) 22 Cal.3d 258.

days good time/work time local conduct credits. (C.T. 120.)

On October 10, 1996, appellant filed a timely notice of appeal from the judgment of conviction and sentence. (C.T. 122.)

STATEMENT OF FACTS

Prosecution Case:

At approximately 1:40 a.m. on March 19, 1996, Los Angeles Deputy Sheriff Richard Schlegel and his partner, Officer Creamer, were driving northbound on Normandie Avenue approaching 93 rd Street in Los Angeles when Schlegel observed appellant driving in a car in front of them. (R.T. 119-120.) Schlegel observed appellant's vehicle registration was expired, and appellant was straddling two lanes. Schlegel initiated a traffic stop by turning on his rotating lights and spotlight. (R.T. 120-121, 131.)

When Schlegel approached the driver's side of the car, he noticed a female sitting in the front passenger seat. (R.T. 121.) After determining appellant did not have his driver's license, Schlegel took appellant and placed his into the back seat of the patrol car. (R.T. 121, 136-137.) Schlegel then conducted a status check of his license on his computer, as well as a warrant check, and discovered there was a warrant for appellant's arrest. (R.T. 121-122, 132.) Appellant was then arrested and handcuffed. (R.T. 122.)

Thereafter, Schlegel searched appellant for weapons and contraband. (R.T. 122-123, 132-133, 136.) During the search, Schlegel retrieved a small zip-lock baggie containing a rock-like off-white substance resembling rock cocaine from the coin pocket of appellant's pants. (R.T. 123, 125, 134.) Based on his training and experience, Schlegel opined the rock recovered was a usable amount of cocaine. (R.T. 125.)

By stipulation, Los Angeles Sheriff's Department Criminalist Vern Traxler performed a physical and chemical test on the substance that was found in appellant's pocket, and

determined the substance contained .10 grams of cocaine in base form. (R.T. 148.)

Defense Case:

In the early morning hours of March 19, 1996, appellant was driving to see his father when he saw Deputies Schlegel and Creamer drive past him. (R.T. 175.) At that time, appellant did not have anyone in the car with him. (R.T. 175.)

About 20 minutes later, appellant saw Particia Johnson walking down the street and asked her why she was out that late at night. (R.T. 176.) After speaking with Johnson, appellant told her he would give her a ride because he was headed the same way. (R.T. 176-177.) When Johnson got into the car, appellant did not know she had cocaine pipes in her purse, and did not know if sh had any drugs on her. (R.T. 177.)

When he was getting ready to drive away, appellant saw Deputies Schlegel and Craemer again. (R.T. 177.) As he pulled across the intersection, the deputies made a U-turn and turned on their lights. (R.T. 178.) Appellant then stopped and the deputies pulled up behind him. (R.T. 178.)

Thereafter, Deputy Schlegel approached the driver's side of the car and asked appellant for his driver's license. (R.T. 178, 193.) Appellant told Schlegel he did not have the driver's license on him, but had a DMV printout and a California Identification card. (R.T. 179, 193.) Appellant was then told to get out of his car, at which time he was handcuffed and placed into the back of the patrol car. (R.T. 179, 193.)

At that point, Deputy Creamer stayed at the patrol car with appellant as Deputy Schlegel searched appellant's car. (R.T. 179-180.) During this time, Johnson was still sitting in the front passenger seat of appellant's car (R.T. 180.)

After searching the car, Schlegel came back to the patrol car and told appellant to get out. (R.T. 180.) Schlegel then asked appellant where the registration to the car was. (R.T.

181.) Appellant told Schlegel the papers were in his wallet in his back pocket, and Schlegel removed the wallet from appellant's pocket. (R.T. 181.) Schlegel then searched appellant again, saying, "I know you got something." (R.T. 182-183.) Appellant told Schlegel he did not have any drugs, and was then put back into the patrol car. (R.T. 183.)

Thereafter, Schlegel went back over to appellant's car and search the car again. (R.T. 181.) Schlegel then came back to the patrol car and had appellant get out. (R.T. 182.) Appellant's handcuffs were removed, and he was told to place his hands on top of his car, while Schlegel searched him again. (R.T. 183.) During the search, Schlegel again told appellant, "I know you have something." (R.T. 183.) Appellant denied having any drugs on him, and was then placed back into the patrol car. (R.T. 183.)

Soon after, Schlegel told Patricia Johnson to leave, then told appellant to get out of the car. (R.T. 183.) When appellant got out of the car, Schlegel told him he was going to jail. (R.T. 183, 191, 196.) Appellant asked Schlegel, "For what? All I have is a violation. I told the truth." (R.T. 183.) Schlegel then said "For this," and held out a plastic baggie in his hand. (R.T. 183, 191.) When he saw the baggie, appellant immediately stated, "That is not mine, sir. I never used controlled substances in my life." (R.T. 183-184 197.)

Appellant denied using rock cocaine, and denied having any in his possession on the night of March 19, 1996. (R.T. 187-188.)

Los Angeles Sheriff's Deputy George Creamer testified that when appellant was stopped, Creamer approached the passenger side of appellant's car and spoke with Patricia Johnson. (R.T. 161.)

Creamer asked Johnson to get out of the car so he could search her for weapons. (R.T. 161.) Creamer then had Johnson lift up her jacket and open her purse. (R.T. 161.) When Johnson opened her purse, Creamer observed a small bag inside, which contained a cocaine pipe. (R.T. 161-162.) When Creamer told Johnson he saw a cocaine pipe, Johnson

laughed and said she had a few pipes. (R.T. 162.) However, Creamer did not look for the other pipes. (R.T. 162.) Creamer did ask Johnson if she had any drugs on her, but Johnson said she did not. (R.T. 165.)

Creamer did not search Johnson for drugs because he felt he did not need to search her, and he does not search females thoroughly in the field with a female officer present. (R.T. 162.)

Creamer was familiar with Johnson as she was a prostitute and he had seen her hanging around the area, which was known for its high volume of drug use. (R.T. 163.) Creamer has also seen Johnson standing in front of several dope houses where cocaine is smoked. (R.T. 163.)

Rebuttal:

On the night of March 19, 1996, Deputy Schlegel was driving and Deputy Creamer was the passenger. (R.T. 200.) As the driver, in a traffic stop, it is Schlegel's duty to contact the driver of the vehicle, ascertain if he has a driver's license and registration for the car, and tell the driver why he was stopped. (R.T. 200.) If the vehicle is to be searched, this would be done by the deputy that was the passenger in the patrol car. (R.T. 201.) Due to officer safety concerns, a vehicle is never searched while there is still a person sitting inside. (R.T. 201.)

ARGUMENT

I.
THE TRIAL COURT ERRED IN DENYING APPELLANT'S WHEELER MOTION WHERE THE PROSECUTOR IMPROPERLY USED A PEREMPTORY CHALLENGE TO ELIMINATE A YOUNG AFRICAN-AMERICAN MEMBER OF THE JURY PANEL

Appellant is African-American. (C.T. 124.) During voir dire, appellant's counsel brought a Wheeler motion based on the prosecutor's exclusion of jurors #16 and #19, two African-American members of the prospective jury panel. (R.T. 66.) The court found a prima facie case of race bias had been established, but denied appellant's Wheeler motion as it concluded that the prosecutor's reasons for excusing jurors #16 and #19 were proper. (R.T. 71-72.) Appellant respectfully submits the court's ruling s to juror #16 was erroneous and violated appellant's state and federal constitutional rights to trial by jury.[3]

A. The Sixth Amendment, The Fourteenth Amendment, Due Process Principles, And California Law Require that the Accused Be Tried Before An Impartial Jury of His Peers

The Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 16 of the California Constitution, guarantee a right to trial by jury to a criminal defendant, including the right to a unanimous verdict rendered by an impartial jury. (Batson v. Kentucky (1985) 476 U.S. 79

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3. Appellant does not contend that the court erred in denying the Wheeler motion as to juror #19.

[90 L.Ed. 2d 69, 106 S.Ct. 1712]; People v. Wheeler, supra, 22 Cal.3d 258.)[4] As stated by the Supreme Court in Taylor v. Louisiana (195) 419 U.S. 522, 530 [42 L.Ed2d 690, 95 S.Ct. 692], the purpose of the jury is to:

> [G]uard against the exercise of arbitrary power – to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and a . . .a professional or perhaps over conditioned or biased response of a judge. (Ibid.)

Regardless of whether the challenge is under state or federal law, the procedure for challenging improper us of peremptory challenges is the same. (People v. Sanders (1990) 51 Cal.3d 471, 502, fn. 10.) The defense must raise the issue at the earliest possible time and must make as complete a record as possible under the circumstances. (People v. Perez (1994) 29 Cal.App.4th 1313, 1326; People v. Ortega (1984) 156 Cal.App.3d 63, 68-70.)

Secondly, it must then be established that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. (People v. Perez, supra, 29 Cal.App.4th at p. 1326.) Thirdly, the defense must show a strong likelihood that such persons are being challenged because of group association rather than because of a specific bias. (People v. Wheeler, supra, 22 Cal.3d at p. 280.) Once the above is shown, i.e., a prima facie case, the burden then shifts to the prosecutor to come forward with a race-neutral explanation for its use of the peremptory challenge. (Id., at pp. 281-282; see also Batson v. Kentucky, supra, 476 U.S. at pp. 96-98.)

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4. Wheeler did not raise a federal constitutional violation and thus, the decision was specifically limited to a challenge under the California Constitution. (People v. Wheeler, supra, 22 Cal.3d at pp. 263, 276-277.)

In People v. Jackson (1992) 10 Cal.App.4th 13, 19, 23, the court held the appropriate appellate standard of review is the substantial evidence test and concluded that:

> [W]hen the moving party hs made a primafacie case showing of group bias in the exercise of peremptory challenges, and the opposing party has offered an explanation for the challenges which on its face is free of group bias, the issue presented to the trial court is one of fact. Accordingly, its ruling on the motion will be upheld on appeal if it is supported by substantial evidence, *unless the record indicates that the trial court misundertood the nature of its obligations* under Wheeler, *or otherwise based its rulings on something other than a resolution of the factual issue.* (People v. Jackson, supra, 10 Cal.App.4th at p. 23 [italics added].)

B. **The Trial Court Erred In Denying Appellant's Wheeler Motion After The Prosecutor's Improper Challenge To Juror #16**

Prospective juror #16 was a young, single, African-American female, who was an automations clerk for the Federal Aviation Administration. (R.T. 42.) She did not have any children. (R.T. 42.0 Juror #16 understood the concepts of reasonable doubt and presumption of innocence. She thought that possession of rock cocaine ought to be against the law. (R.T. 43.) Further, prospective juror #16 had never had any problem with alcohol or drug abuse and no one close to her had ever been accused of committing any crime that involved the use or possession of drugs or drug paraphernalia. (R.T. 42-43.)

This was the entirety of the biographical information

elicited from prospective juror #16. The prosecutor did not ask prospective juror #16 any questions.

Fter appellant's counsel objected to the prosecutor's peremptory challenges to prospective jurors #16 and #19, the court had the following colloquy with the prosecutor:

> THE COURT: Ms. Satriano, would you like to be heard as to whether there has been a prima facie case established?
>
> MS. SATRIANO: Yes. [¶] We have, it appears to me, two people of color, African-American type, left on the jury. I have excused two white people and two black people. I don't think there has been any particular people that have been excluded [¶] Apparently, there are no glaring minorities up there. So it is not like I am picking on any certain minority. I don't think there has been a sufficient showing.
>
> THE COURT: It does appear to me that a prima facie case has been established. So I am going to ask you, Ms. Satriano, to justify your peremptory challenges of Ms. 019 and Ms. 016.
>
> MS. SATRIANO: Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. [¶] I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. (R.T. 66-67.)

Following this exchange. the court excused the jury panel and had the following colloquy with the prosecutor and appellant's counsel pertaining to juror #16:

> THE COURT: . . .Ms. Satriano, did you have any additional justification to offer for the exercise of the two peremptory challenges?
> MS. SATRIANO: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is a male and there is a male African-American on the jury that has been on it since the beginning. I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of African-American color, black color on the jury, still seated. [¶] That is it, your Honor, at this point. [¶] Does the court need cases for those types of reasons as being upheld in other courts, age and gender an inexperience with a certain subject area?
>
> THE COURT: I'll let you know. Ms. Nachman, Would you like to be heard?
>
> MS. NACHMAN: Yes. [¶] Ms. Satriano has talked about looking for more male-female balance. [¶] I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [¶] . . . Certainly, the fact that Ms. 016 was young, I don't think that the prosecutor can pick and choose jurors by just saying I want more male-female balance or I want more older people. [¶] Two African-American jurors – and my client for the record, is African-American – have been removed without any obvious valid reasons. [¶] This is a third-strike case. It is very important. I don't feel it is right to kick people off the jury just because of their race. (R.T. 68-70.)

Following these comments, the court asked the prosecutor for authority for the proposition that challenges

based on gender were proper. The prosecutor acknowledged she did not have any and the following colloquy took place:

> THE COURT: I recall the United States Supreme court saying that the use of peremptory challenges based on gender is improper. [¶] I don't see, Ms. Satriano, that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it.
>
> MS. SATRIANO: I think I tied tht into a lack of ties in the community with both of them; That that was one factor that I considered; that is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.
>
> THE COURT: I am not talking about youth versus age. [¶] Is it submitted?
>
> MS. SATRIANO: Yes.
>
> MS. NACHMAN: Submitted.
>
> THE COURT: . . . [W]ith regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; However, Ms. 016 was a youthful person as was 006. And one or more other prospective jurors also. the court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016. [¶] So the Wheeler motion is denied. (R.T. 71-72.)

As will be demonstrated, the court's ruling denying appellant's Wheeler motion was erroneous because (10 the exclusion of a single juror of a cognizable group is sufficient

to establish a Wheeler motion, (2) the denial of a Wheeler motion on the basis of age alone is improper, and (3) the court did not engage in a "sincere and reasoned" attempt to evaluate the prosecutor's reasons for excluding prospective juror #16.

1. A Wheeler Motion Can Be Properly Brought After The Exclusion Of A Single Member Of A Cognizable Group[5/]

In light of the fact that the United States Supreme court has focused on the rights of every individual juror to sit on the jury, it appears that a violation occurs once the first juror is excluded because of his race regardless of what occurs afterwards. (Batson v. Kentucky, supra, 476 U.S. at p. 92.)

Moreover, although the focus has heretofore been on the systematic exclusion of members of the jury, it is clear that the improper exclusion of even one juror under this type of practice would violate the defendant's right to a fair trial. (People v. Fuentes (1991) 54 Cal.3d 707; see also Batson v. Kentucky, supra, 476 U.S. at pp. 84-85.)

> [T]his court, and others, sometimes use the term "systematic exclusion" to describe a discriminatory use of peremptory challenges. The term is not apposite in the Wheeler context, for a single discriminatory exclusion may violate a defendant's right to a representative jury. The term more

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5. African-Americans are a cognizable group for purposes of both Wheeler (People v. Wheeler, supra, 22 Cal.3d at p. 280, fn. 26) and Batson (Batson v. Kentucky, supra, 476 U.S. at pp. 84-89 [106 S.Ct. at pp. 1716-1719]).

properly refers to under representation in the venires from which juries are selected, in the context Duran v. Missouri (1979) 439 U.S. 357 [58 L.Ed.2d 579, 99 S.Ct. 664]. (People v. Fuentes, supra, 54 Cal.App.3d at p. 716. fn. 4; see also People v. Gonzales (1989) 211 Cal.App.3d 1186, 1193; see also Turner v. Marshall (9th Cir. 1995) 63 F.3d 807; United States v. Vasquez-Lopez (9th Cir. 1994) 1 F.3d 751 [there is no numerical requirement for a Wheeler/Batson violation, and a single improper exercise of a peremptory challenge may, under certain circumstances, be enough]; United States v. Iron Moccasin (8th Cir. 1989) 878 F.2d 226, 228-229; United States v. Roan Eagle (8th Cir. 1989) 867 F.2d 436, 440-442; United States v. Chalan (10th Cir.1987) 812 F.2d 1302, 1314.)[6]

In this regard, the view of the California Supreme Court is instructive:

> [U]nder Batson, the striking of a single black juror for racial reasons violates the equal protection clause, even though other

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6. The language in People v. Fuentes, supra, effectively overrules cases where the various Courts of Appeal have inferred that a systematic exclusion has not taken place where a prosecutor only removed two jurors or where the prosecution did not act to exclude all the members of a cognizable class of persons. (See e.g., People v. Rousseau (1982) 129 Cal.App.3d 526, 536-537; People v. Harvey (1984) 163 Cal.App.3d 90, 111-112; People v. Christopher (1991) 1 Cal.App.4th 666, 671.)

> black jurors are seated, and even when there are valid reasons for the striking of some black jurors. (People v. Fuentes, supra, 54 Cal.3d at p. 715; see also United States v. Battle (8th Cir. 1987) 836 F.2d 1084, 1086; see also United States v. Gordon (11th Cir. 1987) 817 F.2d 1538, 1541; United States v. David (11th Cir. 1986) 803 F.2d 1567, 1571; People v. Gonzalez, supra, 211 Cal.App.3d at p. 1193.)

The reason for such a rule is clear. If the discriminatory conduct impacts not only on the defendant but on the individual juror, then *any* exercise of the discriminatory practice intrudes on the integrity of the criminal proceeding by denying the defendant the right to a fair trial *and by denying* the individual juror the right to participate in the activities of the government.

2. The Prosecutor's Exclusion Of Juror #16 Based Solely On Her Age Was Improper

The issue regarding the exclusion of jurors because of their age is both controversial and unresolved in our highest tribunals. A line of First district cases in the specific context of Wheeler motions have refused to recognize youth as a cognizable group in the selection of petit juries. (See e.g., People v. McCoy (1995) 40 Cal.App.4th 778, 784; People v. Marbley (1986) 181 Cal.App.3d 45, 47-48; People v. Parras (1984) 159 Cal.App.3d 875, 877; People v. Estrada (1979) 93 Cal.App.3d 76, 93, disapproved on another point in DeLancie v. Superior Court (1982) 31 Cal.3d 865.) However, in light of the fact that our Supreme Court has yet to address the issue specifically, there is authority directly to the contrary, and in the Wheeler/Batson inquiry, far more persuasive. (See

Paciona v. Marshall (1974) 45 A.D.2d 462, 359 N.Y.S. 2d 608; State v. Holstrom (1969) 43 Wis.2d 465, 168 N.W.2d 574; see Also Zieger, *Young Adults as a Cognizable Group in Jury Selection* (1978) U.Mich.L.Rev. 1045.)

In a related context, several appellate opinions have held that age discrimination in the selection of grand jurors is not tolerable. (People v. Fajita (1974) 43 Cal.App.3d 454, 475-476, cert. den.; Fajita v. California (1975) 421 U.S. 964; People v. Superior Court (Dean) 1974) 38 Cal.App.3d 966, 970; but see People v. Hoiland (1971) 22 Cal.App.3d 530, holding to the contrary

Age differences in society are not random; they are patterned and systematic. Indeed, "[a]ge operates as a basis of social stratification much like class and divides our society into three broad, post-childhood segments: the young, middle-aged and aged." (Ziegler, *Young Adults as a Codnizable Group in Jury Selection*, supra, 76 U.Mich.L.Rev. at p. 1074, fns. omitted.) Since the great majority of criminal offenders are young, a jury of one's peers ought to at least include an opportunity for some representation from the same generation as part of a cross-section of the community.

Furthermore, youth of this country unquestionably comprise one of the largest and most diverse groups in society.[7] Therefore, to permit the exclusion of young people

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7. A breakdown of the United States population by age reveals that the median age is 32.9 years, and that people between the ages of 21 and 44 comprise well over one-third of our population. According to the Bureau of the Census, U.S. Department of Commerce 1990 census figures, the population breakdown is as follows:

Total population. 248,709,873
Age
Under 5 years. 18,354,443
5 to 17 years. 45,249,989
18 to 20 years. 11,726,868

from juries based on age alone suggests the bizarre notion that the greater the size of a class, the less likely it will be held cognizable for purposes of jury composition. If a minority may not be the subject of a discriminatory challenge, how could a group much larger, e.g., a majority, be excluded? The idea that size, great or small, has anything to do with this analysis is self-refuting and nonsensical. As the United States Supreme Court has noted, "Restricting jury service only to special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." (Taylor v. Louisiana, supra, 419 U.S. 522, 530.)

In the instant case, the probation report states that appellant was 35 years old at the time of his trial. (C.T. 124.) Thus, appellant might not be considered a member of the "youth" class. However, this is not dispositive as it is well-established that one need not be a member of the excluded class in order to complain of the failure to afford a jury drawn from a representative cross-section of the community. (Rubio v. Superior Court (1979) 24 Cal.3d 93, 103.)

The fact that this case involved cocaine possession is also

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21 to 24 years. 15, 010, 898
25 to 44 years. 80,754,835
45 to 54 years. 25,223,086
55 to 59 years. 10,531,756
60 to 64 years. 10,616,167
65 to 74 years. 18,106,558
75 to 84 years. 10,055,108
85 years and over. 3,080.165
Median age. 32.9

(United States Population - A Typical American As Seen Through the Eyes of the Census Bureau, by Dr. Barbara Everitt Bryant, Director, Bureau of the Census, U.S. Department of Commerce - 1990, pp. 2-3.)

significant. The phenomenon of anti-drug sentiments and slogans, i.e., "Just Say No", is in large part, an outgrowth of the problem with drug abuse in today's youth. In light of this reality, the exclusion of juror #16 based solely on her youthful age underscored the error in failing to afford appellant a fair trial. Just as there can be no substitution of one racial minority for another or one sex for another, there is no logical rationale for a constitutionally permissible substitution of one age group for another. Notwithstanding appellant's recognition of the contrary authority, the importance of the constitutional fair trial implications require that this state recognize age groups as a cognizable class which may not be systematically excluded by the arbitrary use of peremptory challenges.

3. The Trial Court Erred In Failing To Make A "Sincere' and "Reasoned" Attempt To Evaluate The Prosecutor's Reasons For Excluding Prospective Juror #16

Once a prima facie case of race bias has been shown, the burden shifts to the other party to come forward with an explanation that demonstrates a neutral explanation related to the particular case to be tried. (People v. Tapia (1994) 25 Cal.App.4th 984, 1013.) Once a facially neutral explanation has been given, the trial court is required to satisfy itself that the explanation is *genuine*. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily because appellate courts rely on the judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived

to avoid admitting acts of group discrimination. (People v. Hall (1983 35 Cal.3d 161, 167-168; [italics added].)"The trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (People v. Fuentes, supra, 54 Cal.3d at p. 720.)

The prosecutor's justification for excusing prospective juror #16 was unjustified. Prospective juror #16 answered all of the biographical questions that were posed to her, and the court merely accepted the prosecutor's reasons without conducting a "sincere" and "reasoned" analysis. In denying appellant's Wheeler motion, the court acknowledged that it did not observe the demeanor of juror #16 that the District Attorney complained of. Nevertheless, the court denied the Wheeler motion solely based on the fact that juror #16 was young. (R.T. 71-72.) This was where the error occurred as the court failed to "undertake a 'reasoned attempt' to evaluate the prosecutor's explanations." (People v. Fuentes, supra, 54 Cal.3d at p. 720.)

The case of People v. Turner (1986) 42 Cal.3d 711, is illustrative of the court's error. In Turner, the California Supreme Court reversed the defendant's murder conviction, based upon the finding that the prosecutor's use of peremptory challenges was racially motivated. However, the high court determined not only that the prosecutor's reasons were inadequate, but that this inadequacy "was compounded by the court's apparent acceptance of those reasons at face value." (Id., at p. 727.) The court reasoned that the trial court failed "in his duty to carefully evaluate the prosecutor's proffered explanations for these challenges in light of all the circumstances of the case." (Id., at p. 715.)

> [A]s we have seen . . . the prosecutor's explanations were either implausible or suggestive of bias. They therefore "demanded further inquiry on the part of the trial court" [citation], followed by a "sincere and reasoned" effort by the court

> to evaluate their genuineness and sufficiency in light of all the circumstances of the trial [citation]. Each step is "'imperative, if the constitutional guarantee is to have real meaning' [citation]." (People v. Turner, supra, 42 Cal.3d at pp. 727-728; see also People v. Hall, supra, 35 Cal.3d 161.)

In the instant case, the prosecutor's stated reasons for excluding juror #16 was her youth and her demeanor. (R.T. 68-70.) The court did not observe the demeanor of juror #16 that was complained of by the prosecutor. Nevertheless, the court ruled that the peremptory challenge was proper because juror #16 was youthful. (R.T. 70.) As mentioned previously, this reason was improper. Since the record demonstrates that nothing other than her youth distinguished her from the community as a whole, the court erred in determining tht the prosecutor had sufficient *genuine* reasons to justify a peremptory challenge. (People v. Wheeler, supra, 22 Cal.3d at pp. 280-281; [italics added].)

C. Where Wheeler Error Has Occurred, The Matter Must Be Reversed And Remanded For a New Trial

Where an error has occurred under Wheeler, the proper remedy is reversal of the conviction This is a reversible per se rule which has been adopted and followed continually by California courts. (People v. Motton (1985) 39 Cal.3d 596, 608; see also Holly v. J.S. Sweeping Co. (1983) 143 Cal.App.3d 588, 594.)

Even a single error, or unjustified exclusion will require reversal. (People v. Granillo (1987) 197 Cal.App. 110, 123.)

> The right to a fair and impartial jury is one of the most sacred and important of the guarantees of the constitution. Where it has been infringed, no inquiry as to the

> sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside. (People v. Wheeler, supra, 22 Cal.3d at p. 283.)

Based on the foregoing, it is evident that the court abused its discretion in denying appellant's Wheeler motion. Appellant did in fact make a *prima facie* showing of discriminatory conduct by the prosecution regarding the exclusion of prospective juror #16, and the prosecutor's reasons for excusing prospective juror #16 were insufficient to show that racial animus did not exist. The error is reversible per se. (People v. Motton, supra, 39 Cal.3d at p. 608; see also Holly v. J.S. Sweeping Co., supra, 143 Cal.App.3d at p. 594.)

II.

THE COURT ERRED IN TREATING TWO COUNTS OF CONVICTION FROM ONE PRIOR CRIMINAL CASE AS SEPARATE STRIKES UNDER THE THREE STRIKES LAW[8]

The prosecution alleged that appellant had been convicted of two prior serious or violent felonies, thereby bringing him with the "Three-Strikes" provisions of Penal Code section 667, subdivisions (d) and (e). Specifically, it was alleged that appellant was convicted of robbery (Pen. Code, § 211) and forcible rape (Pen. code, § 261, subd. (2)) on January 25, 1982, in Case No. a199738. (C.T. 15.) Appellant respectfully submits that he could not be sentences as a "Three-Strikes" offender because his two strikes arose from individual counts of the conviction in Case No. A199738. Specifically, appellant contends that the term "conviction" as used in the strikes statute is ambiguous and fails to give fair warning that each count from a single prior case can be used as a strike.

Appellant recognizes that recent Courts of Appeal have heretofore construed the statute to allow a defendant to receive a strike from each count of a single prior conviction. (See, e.g., People v. Allison (1996) 41 Cal.App.4th 841; People v. Superior Court (Arevalos) (1996) 41 Cal.App.4th 908; People

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8. Preliminarily, it should be noted that this issue is currently pending before the California Supreme Court in People v. Fuhrman (1996), formerly 47 Cal.App.4th 1740, review gr. November 13, 1996 (SO55920). Should this Court decide that appellant's contentions fail here, appellant nevertheless presents this argument so as to preserve presentation of the issue before the California Supreme Court. That Court must ultimately decide the issue and accordingly, appellant presents the argument herein.

v. Askey (1996) 49 Cal.App.4th 381.) Nevertheless, as will be demonstrated below, appellant respectfully submits these decisions were wrongly decided.

The term "prior conviction," as used in section 667, subdivision (c), is ambiguous. As such, it must be construed in favor of appellant. When the term "prior conviction" is construed in accordance with the definitions given the same term in related sections of the statute, and keeping in mind the purpose behind a recidivist statute, it is apparent that a "prior conviction" refers to separate case, not the individual counts within a case. If the term "prior conviction" means the individual counts of a case, the statute violates the constitutional guarantee of due process because it fails to give proper notice of the meaning of the term.

"When language which is susceptible of two construction s is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (People v. Overstreet (1986 42 Cal.3d 891, 896.) Moreover, "a conclusion that a statute is ambiguous need not be premised upon the use of words which are themselves ambiguous. The structure or interaction of various parts of a statute may provide a basis for a conclusion that a statute is ambiguous." (People v. Clark (1992) 10 Cal.App.4th 1259, 1264.)

A. The Term "Prior Conviction" As Used In Section 667, Subdivision (d) Is Ambiguous

A defendant falls within the provisions of the strikes law if he or she "has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d) . . ." (Pen. Code, § 667, subd. (c).) Subdivision (d)(1) of section 667

defines a "prior conviction" as "(a) [**a]ny offense** defined in subdivision (c) of Section 667.5 as a violent felony or **any offense** defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically upon the initial sentencing, converts the felony to a misdemeanor . . . . " (Pen. Code, § 667, subd. (d)(1); [emphasis added].)

Contrary to the court of Appeal decisions, the use of the term "offense" does not clearly denote a legislative intent to allow individual counts of a prior case to each serve as a strike.

First, the Penal Code itself mandates that in interpreting its provisions, "the singular number includes the plural, and the plural the singular." (Pen. Code, § 7.) The Legislature is presumed to have been aware of section 7 when it enacted the strikes statute. (People v. Overstreet, supra, 42 Cal.3d at p. 897.) Thus, the singular "offense" could include the plural "offenses" adjudicated in a single case.

It is recognized that the term "conviction" "do[es] not have a uniform or unambiguous meaning in California." (People v. Vessell (1995) 36 Cal.App.4th 285, 291; accord Boyll v. State Personnel Bd. (1983 146 Cal.App.3d 1070, 1073.) The ambiguity in the meaning of the term "prior conviction" was noted in a memorandum prepared by the Legislation Subcommittee of the Criminal Standing Advisory Committee of the Judicial Council of California, Administrative Office of the Courts, Honorable Richard D. Huffman, Chair. The Subcommittee noted the discrepancy between section 667, subdivision (a), which limits the five year prior serious felony conviction enhancement to "charges brought and tried separately," and section 667, subdivision (e), which refers only to "two prior felony convictions." The Subcommittee observed that "it is not clear whether multiple strikes are to be imposed for convictions not brought and tried

separately." (See Advisory Committee Rep. for Judicial Council of Cal., AB 971 (JONES/COSTA) - Enactment of "Three Strikes" Legislation (1994), at p. 11.)

The California Supreme Court recently construed the term"prior conviction" in the context of the initiative version of the "Three-Strikes" statute in People v. Hazleton (1996) 14 Cal.4th 101. In Hazelton the defendant contended that the initiative version of the strikes statute, found in section 1170.12, did not allow an out-of-state prior conviction to qualify as a strike. (Id., at p. 103.) In rejecting this argument, the court ruled that the phrase "prior felony conviction" as used in section 667, subdivision (b)(1) refers to the **nature** of the prior conviction, i.e., whether it is a violent or serious felony. (Id., at p. 108; [emphasis added].)

Although subdivision (d) 91) does not clearly state whether each count in a case is to be considered a separate conviction and, thus, a separate strike, the meaning of the term "prior conviction" can be ascertained from the other subdivisions of the statute. For example, in subdivisions (c)(6) and (c)(7) of section 667[9], the term "conviction means a

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9. Penal Code section 667, subdivision (c) provides, in relevant part: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has **one or more prior felony convictions** as defined in subdivision (d), the court should adhere to each of the following: . . . (6) If there is **a current conviction for more than one felony count** not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e). (7) If there is **a current conviction for more than one serious or violent felony** as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." (Emphasis added.)

single case consisting of "more than one felony count" (Pen. Code, § 667, subd. (c)(6)) or more than one serious or violent felony." (Pen. Code, § 667 subd. (c)(7).) This definition of "conviction" is similar to the definition of "prior conviction" found in section 667, subdivision (a). There, a prior conviction can be imposed only for "charges brought and tried separately."[10/] (See In re Harris (1989) 49 Cal.3d 131, 136.)

Similarly, under the strikes statute, multiple counts of a prior juvenile adjudication are treated as a single prior conviction. Section 667, subdivision (d)(3) provides that "[a] prior juvenile adjudication shall constitute a prior felony conviction." A juvenile "adjudication" is a finding that a juvenile is a ward of the court. (Welf. & Inst. Code, § 602.) Each adjudication can result from many different felony offenses. (See, e.g., In re Richard C. (1994) 24 Cal.App.4th 966, 968.) Yet, the Legislature did not make each separate juvenile offense a separate "prior felony conviction" under the statute, only each prior juvenile adjudication constitutes strike, irrespective of the number of felonies in each adjudication. There is nothing in the statute to suggest that the Legislature assumed a different treatment for adult prior convictions.

"It is well-settled that a word or phrase should be given the same same scope of meaning when it appears in separate parts of a statute." (People v. Mirmirani (1981) 30 Cal.3d

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10. Penal Code section 667, subdivision (a) provides: "(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to sentence imposed by the court for the present offense, a five-year enhancement for each such **prior conviction on charges brought and tried separately**. The terms of the present offense and each enhancement shall run consecutively." (emphasis added.)

375, 382, fn. 6.) Thus, the term "conviction" in subdivision (d) should be afforded the same meaning as that term is given in subdivisions (a) (1), (c) (6), (c) 7), and (d) (3), i.e., that a conviction consists of the entire case and not the individual counts within a case. Under this definition, the separate counts of appellant's prior case -- Case No. A199738 -- would comprise just one "prior conviction."

The Legislature's failure to expressly state that individual counts of a single prior case each count as a strike is significant when considered in light of other restrictions expressly provided for in the statute. For example, the Legislature expressly provided that application of the "Three-Strikes" law is not restricted by the length of time between the prior and current convictions (Pen. Code, § 667, subd. (c) (3)), a restriction found in both section 667.5 (regarding prior prison terms) and section 6676.7 (regarding habitual offenders of crimes involving great bodily injury).

Similarly, the Legislature specifically provided that the determination of whether a prior felony conviction qualifies as a strike is not restricted by the failure of the prior to result in a prison term (Pen. Code, § 667, subds. (d) (1) (A)-(B)), a restriction found in section 667.6. In addition, the Legislature expressly provided that a determination of whether a prior felony conviction qualifies as a strike is not affected by placement in the California Rehabilitation Center (Pen. Code, § 667, subd. (d) (1) (D)). another restriction found in section 667.5. (See People v. Shoals (1992) 8 Cal.App.4th 475, 501.)

As acknowledged earlier, several Courts of Appeal have held that prior counts form a single case can be used a separate strikes. (See, e.g., People v. Superior Court (Arevalos), supra, 41 Cal.App.4th 908; People v. Allison, supra, 41 Cal.App.4th 841; People v. Askey, supra, 49 Cal.App.4th 381.) These courts have reasoned that if the Legislature had wanted to require the strikes to be from separate cases, it could have so asserted. (People v. Superior Court (Arevalos), supra, 41 Cal.App. 4th at pp. 915-916; People v. Allison, supra, 41 Cal.App.4th at pp. 845-855; People v. Askey, supra, 49

Cal.App.4th at p. 386.) None of these cases acknowledge the obvious converse conclusion – that had the Legislature intended two strikes from a single case, it could have so asserted.

Despite implications in Arevalos, Allison, and Askey that the language in the strikes law is clear and unambiguous, such a conclusion could not be further from the truth. The "emergency" legislation that was enacted as section 667, subdivisions (b) - (i), and passed by the voters as section 1170.12, is confusing and full of ambiguities. (See, e.g., People v. Hazelton, supra, 14 Cal. 4th at pp. 105-106 [Pen. Code, § 1170.12 ambiguous regarding the inclusion of out-of-state convictions in at least two respects]; People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 529-530[ambiguity in whether strikes statute allows court to strike prior conviction under section 1385 construed in favor of defendant]; People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 979 [upholding trial court's discretion to reduce felony to misdemeanor although neither version of strikes law speaks directly to the issue].)

In summary, there is an ambiguity in the strikes statute as to whether each count from a single prior case can be considered a strike. This ambiguity should be construed in favor of appellant. (People v. Overstreet, supra, 42 Cal.3d at p. 896.) Otherwise, if each count of a single prior case is allowed to serve as a strike, the determination of whether a defendant is a two or three strike offender could turn on the charging policies of a particular district attorney rather than the defendant's actions. The Legislature surely did not intend such an arbitrary and irrational result.

B. Appellant's Construction Of the Strikes Statute Is Consistent With The Purpose Of Recidivist Statutes

Appellant's construction of the strikes statute is consistent with the purpose of recidivist statutes. As the

California Supreme court observed in People v. Balderas (1985) 41 Cal.3d 144, the presumed rationale of statutes calling for harsher penal treatment on the basis of "prior convictions" "is that an offender undeterred by his **prior brushes with the law** deserves more severe criminal treatment." (Id., at p. 202; [emphasis in original].)

In Balderas, the court considered the meaning of "prior conviction" as used in section 190.3, subdivision (c). The statute allows the trier of fact to use "prior felony convictions" as a factor in aggravation at the sentencing phase of a capital trial. the term "prior convictions" was construed to mean that the conviction of a nonviolent felony had to entered prior to the commission of the capital offense. The court found it "plausible to assume the initiative's drafters intended the use of nonviolent convictions only for their most material purpose – to demonstrate that the **capital offense** was undeterred by **prior successful felony prosecutions**." (Id., at p. 203; [emphasis in original].) Subdivision (c) of section 190.3 allows evidence of ""prior' nonviolent felony 'convictions' to show that the capital offense was the **culmination of habitual criminality** – that it was undeterred by the community's previous criminal sanctions." (Ibid.; [emphasis in original.)

Similarly, the court in People v. Rojas (1988) 206 Cal.App.3d 795 stated that the principle ""inherent in a habitual criminal statute [is] that the legislature in enacting such a statute intended it to serve as a warning to first offenders and to afford the an opportunity to reform, and **that the reason for the infliction of severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists** in violations of the law after conviction of previous infractions.'" (Id., at p. 799, quoting People v. Diaz (1966) 245 Cal.App.2d 74, 77-78, fn. 1; [emphasis in original].)

Thus, a recidivist is one who continues his criminal behavior despite this punishment. It is the prior punishment which teaches the offender the wrongdoing of his actions. The

number of counts affecting the length of punishment is irrelevant. As one court has stated:

> Consonant with this theory as to the purpose of the law . . . it has been held in the great majority of cases that **two or more convictions on the same day, or on different counts under the same indictment, or convictions at the same term of court cannot be cumulated so as the count as two or more previous convictions within the meaning of habitual criminal statutes**, although, as specifically held in some cases, one of such convictions may be counted as a prior conviction within the meaning of the statute. (People v. Diaz, supra, 245 Cal.App.2d at p. 88, fn. 1, citing 24 A.L.R.2D 1234, PP. 1248-1249; [emphasis added].)

In simplistic terms, if the offender commits a serious or violent crime and is prosecuted and punished, he has one strike against him and a chance to reform. If he does not reform, commits another serious or violent crime, and is prosecuted for the second time, he is punished under section 667 by having his sentence doubled. He now has two strikes against him and is given a second chance to reform. If, "undeterred by the community's previous criminal sanctions" (People v. Balderas, supra, 41 Cal.3d at p. 203), the offender commits another crime and is caught and prosecuted a third time, this is his third strike, and his sentence is life imprisonment under the "Three-Strikes" law.

Appellant received a single punishment for the two counts of conviction in Case No. A1999738. To sentence him to life imprisonment pursuant to section 667, subdivisions (b) - (i) is contrary to the objective of the habitual criminal statute. If multiple counts of a single conviction are permitted to count as strikes, then an offender who has had only one chance to reform can be treated the same as the offender who has had two chances to reform, following two separate convictions each involving one offense. Clearly this does not follow the objective behind the habitual criminal statute. Again, it is after the offender has been twice convicted of a serious or violent crime and twice punished for those crimes that he should suffer the consequences of life in prison as a three strikes offender.

Several examples serve to prove this point. They show the absurd results that can occur when each count of a single prior conviction is allowed to serve as a strike.

If a defendant with no criminal record is convicted of **multiple current** serious or violent felonies, the "three-Strikes" law does not allow the sentencing court to cumulate the current counts of conviction thereby causing the defendant to jump from "no strikes" to "strike three." The defendant may face consecutive sentencing under the strikes law (see, e.g., Pen. code, § 667,subds. (c) (6) and (c) (7)), but he is not considered a two or three strikes offender.

Similarly, if a defendant with one prior serious or violent felony on his record (perhaps a prior robbery conviction) is convicted of **multiple current** serious or violent felonies, the "Three-Strikes" law does not allow the sentencing court to cumulate the current counts of conviction thereby causing the defendant to jump from "strike one" to "strike three" and face a minimum tern of 25 years to life.

Another example further demonstrates the point. If a defendant with no strikes on his record is convicted in the current case of two serious or violent felonies, the defendant is treated as a first strike offender, i.e., he does not fall within the provision of section 667, subdivisions (b) - (i). However,

under the current interpretation of the "Three-Strikes" law by the different Courts of Appeal, immediately upon conviction of the two serious or violent felonies, the defendant now has **two strikes** on his record. The commission of **any** felony sends him to prison for a minimum term of 25 years to life. On the other hand, an offender with one serious or violent felony conviction who is later convicted of two serious or violent felonies in a single proceeding is treated as two strikes offender. There is no rational reason to treat both offenders differently. Both have committed a total of three crimes; yet, the first offender is sentenced as a three strikes offender, while the second offender is sentenced as a two strikes offender. Such a result defies common sense and the rationale behind recidivist statutes.

Appellant has had a single chance to conform to society's norms following a prior conviction consisting of two counts of serious or violent felonies which arose from a single incident. Yet, he is being treated the same as a defendant who has had two chances to reform as a result of two separate period of punishment for two separate prior serious or violent felonies. Clearly this does not comport with the objective behind a habitual criminal statute.

C. The "Three-Strikes" Statute Violates The Constitutional Guarantee Of Due Process Because The Statute Fails To Give Notice Of Whether A Prior Case Or A Single Count Within A Prior Case Is A Strike

Although subdivision (d) (1) of section 667 purports to define a "prior conviction," it does not clarify whether a prior conviction is a prior case, regardless of the number of counts, or a single count within a prior case. As such, the statute is unconstitutionally vague in that it fails to give fair warning of the definition of a strike.

The due process clauses of the federal and state Constitutions

(U.S. Const., amend. XIV; Cal. Const., art. I, § 7) require statutes to (1) give fair warning to persons of common intelligence of the conduct proscribed or required by the statute and (2) to provide adequate guidelines to avoid vesting law enforcement authorities with unlimited discretion in the enforcement of the statute. (Calendar v. Lawson (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 103 S.Ct. 1855]; People v. Mirmirani, supra, 30 Cal.3d at p. 382; In re Newbern (1960) 53 Cal.2d 786, 796.) A heightened standard of definiteness is required for criminal statutes. (See, e.g., Calendar v. Lawson, supra, 461 U.S. at p. 358, fn 8; In re Newbern supra, 53 Cal.2d at p. 792.)

The law requires that a fair warning ""be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statue should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.'" (People Overstreet, supra, 42 Cal.3d at pp. 896-897, quoting McBoyle. United States (1931) 283 U.S. 283 U.S. 25, 27 [75 L.Ed. 816, 51 S.Ct. 340].)

Absent an express statement by the Legislature, the "common mind" would not understand that more than one strike could arise from a single prior case. This is particularly true give the definitions of "prior conviction" and "conviction" found elsewhere in the statute. Limiting the term "prior conviction" to a single case rather than the individual counts in a case is in accord with common usage of the term (cf. People v. Overstreet, supra, 42 Cal.3d at p. 897 [defining "pending trial" in a manner which accords with common usage of word]), and the common understanding of the intent of a recidivist statute. (cf. People v. Balderas, supra, 41 Cal.3d at p. 202).

The lack of a clear definition provides prosecutors and the courts with unlimited discretion in each case to determine which persons should be prosecuted under the "Three-Strikes" law. Each prosecutor and trial court is in effect an ad hoc legislature, determining the reach of this statute. The lack of enforcement guidelines violates state and federal constitutional guarantees of due process and the state constitutional requirement of uniform application of general laws. (See, e.g., Calendar v. Lawson, surpra, 461 U.S. at pp. 358-360; People v. Mirmirani, supra, 30 Cal.3d at p. 382.)

The term "prior conviction" as used in subdivision (d) (1) of section 667 is unconstitutionally vague. Since subdivision (d) (1) is the cornerstone of the statute – all the punishments within that statute hinge on the existence of a prior conviction – the entire statute must be deemed unconstitutional (People v. Mirmirani, supra, 30 Cal.3d at pp. 387-388, fn. 9.)

D. Conclusion

In summary, two or more counts of a single conviction should not each be counted as a strike thereby making a defendant eligible for sentencing as a three strikes offender after just one prior brush with the law. Accordingly, the case should be remanded to the superior court with directions to vacate the sentence and to resentence appellant as a two strikes offender.

III.

THE SENTENCE OF 2 YEARS TO LIFE, TO APPELLANT, CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT

A. Introduction

Appellant possessed a rock of cocaine with a net weight of .10 grams. (R.T. 148.) For this crime, and because of two prior "strike" convictions suffered in "one swing" in 1982. appellant was sentenced to state prison for a term of 25 years to life. Under the "Three-Strikes" law, appellant is not eligible for parole until he serves 25 years. (Pen. Code § 667, subd. (c) (5); People v. Stofle (1996) 45 Cal.App.4th 417, 421.) By contrast, someone who commits a cold-blooded premeditated murder with a firearm receives a maximum sentence of 35 years to life (sections 190, subd. (a) and 12022.5, subd. (a)(1)) and is eligible for parole earlier than appellant. (In re Oluwa (1989) 207 Cal.App.3d 439, 444-447.)

Although the "Three-Strikes" law leads to such sentencing anomalies as a longer sentence for recidivist offenders such as appellant than for violent ones such as a murderer, appellant makes no facial cruel and unusual punishment challenge to the "Three-Strikes" law itself. Instead, he contends that the sentence of 25 years to life, as applied to him, constitutes cruel and/or unusual punishment.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."Article I, section 17 of the California Constitution, using the disjunctive, provides, in relevant part: "Cruel or unusual punishment may not be inflicted . . . ."

An analysis of whether a sentence imposes cruel or unusual punishment must begin with a recognition that "in our tripartite system of government it is the function of the

legislative branch to define crimes and prescribe punishments, and that such questions are in the first instance for the judgment of the Legislature alone." (In re Lynch (1972) 8 Cal.3d 410, 414.) Nevertheless, the Legislature's authority is circumscribed by the constitutional prohibition against cruel or unusual punishment, and it is the "imperative task of the judicial branch, as coequal guardian of the Constitution, to condemn any violation of that prohibition." (Ibid.) A punishment may violate the constitution "not only if it is inflicted by cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (People v. Dillon (1983) 34 Cal.3d 441, 478; footnote omitted.)

In Lynch, the Supreme court set forth three techniques for evaluating a punishment to determine whether it is disproportionate. The court must (1) examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society," (2) compare the challenged penalty with punishment prescribed in California for other, more-serious offenses, and (3) compare the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (In re Lynch, supra, 8 Cal.3d at pp. 425-427.) For a holding of disproportionate in all three respects. Rather, a finding of disproportionality based on any of the Lynch criterial will suffice. (People v. Dillon, supra, 34 Cal.3d 441, 4787 fn. 38; In re Rodriguez (1975) 14 Cal.3d 639, 656.) this does not mean, however, that each of the techniques must be considered in total isolation from the others. When the court stated, in Lynch, that a statute's disparity with punishments in other states "is a further measure of its excessiveness" (In re Lynch, supra, 8 Cal.3d at p. 427, emphasis added), the suggestion is that the measure of disproportionality found in applying the several techniques would be cumulative.

B. The Penalty Is Disproportionate As Applied To This Offense And This Offender

Given the nature of the current offense, viewed alone and in light of appellant's prior offenses, the sentence of 25 years to life violates the Eighth Amendment proscription of punishment which is extreme and grossly disproportionate to the offense.

In Harmelin v. Michigan (1991) 501 U.S. 957 [115 L.Ed.2d 836, 111 S.Ct. 2680], the portion of the lead opinion on which a majority of justices agreed, determined that the sentence in that case was not disproportionate to the offense in violation of Eighth Amendment. Justice Scalia, joined only by Justice Rhenquist, opined that the Eighth Amendment does not contain a guarantee against disproportionality for non-capital offenses. However, seven of the justices in concurring and dissenting opinions stated that the Eighth Amendment prohibits punishment which is extreme and grossly disproportionate to the offense which is the subject of the conviction. (Harmelin v. Michigan, supra, 111 S.Ct. at pp. 2703, 2705, 2709, 2719-2720.)

Since the Harmelin decision, the federal circuit courts have followed this reasoning and have been applying a gross disproportionality test in determining Eighth Amendment challenges punishments imposed for non-capital offenses. (See, e.g., Caoperdo v. Demosthenes (9th Cir. 1994) 37 F.3d 504, 507-508; United States v. Munoz (1st Cir. 1994) 36 F.3d 1229, 1239; United States v. Cupa-Guilen (9th Cir. 1994) 34 F.3d 86, 864-865; United States v. Lanier (6th Cir. 1994) 33 F.3d 639, 665; United States v. Frieberger (8th Cir. 1994) 28 F.3d 916, 920; United States v. Fisher (5th Cir. 1994) 22 F.3d 574, 579-580; United States v. Angulo-Lopez (10th Cir. 1993) 7 F.3d 1506, 1510; United States v. Sarbello (3d Cir. 1993) 985 F.2d 716, 724; McGruder v. Puckett (5th Cir. 1992) 954 F.2d 313, 316-317.) Under that analysis, the sentence

imposed in this case violates the Eighth Amendment to the United States Constitution.

When evaluating the nature of the offense, the court not only considers the offense in the abstract, but also considers the circumstances of the particular crime, such as motive, the way the crime was committed, the extent of the defendant's involvement, and the consequence of his acts. (People v. Dillon, supra, 34 Cal.3d at p. 479.) Likewise, the court views the offender in the concrete rather than the abstract, "and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (Ibid.) In conducting both analyses, the court pays particular attention to the degree of danger both present to society. (In re Lynch, supra, 8 Cal.3d at p. 425.)

Appellant was convicted of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a).) This offense is punishable by 16 months, two years, or three years when the Three Strikes law is not applied. (Health & Saf. Code, § 11350, subd. (a).) Moreover, the offense committed in this case was not particularly aggravated when compared with other possession cases. Appellant allegedly possessed a rock of cocaine that weighed a total of approximately .10 grams. (R.T. 148.)

Turning to the factors related to appellant, his prior offenses do not necessarily indicate an individual with base criminal motives. Appellant suffered his prior "strike" convictions in "one swing" as he was convicted of robbery (Pen. Code, § 211) and forcible rape (Pen. Code, § 261, subd. (2)) on January 25, 1982, in Case No. A199738. (C.T. 15.) Appellant was 21 years old at the time he committed these offenses and was 35 years old at the time of the instant offense. (C.T. 59, 124, 126; R.T. 263.)

While society cannot condone and rightfully punishes such actions as possession of illegal substances, appellant's actions should be mitigated by the minor nature of the current offense. To be sure, appellant recognizes that his prior felony

convictions arguably support some increased punishment for the current offense. However, the extreme punishment imposed in this case for possession of a rock of cocaine with a net weight of .10 grams cannot be rationalized under any credible system of criminal justice. (Cf. In re Lynch, supra, 8 Cal.3d at p. 425.)

As was aptly noted by Justice Nott in People v. Glaster (1995) 36 Cal.App.4th 785, "One of these days a case will arise wherein imposition of the 'three strikes law' is so unfair that the judiciary will be forced to reassert its traditional role as the final arbiter of what is an appropriate sentence. Whether that will be done under the basis of such rationale as separation of powers, cruel and unusual punishment, or the inherent power of the judiciary is yet to be seen. The present case is not the one in which to take such a stand. *But one will soon come along*." (People v. Glaster, supra, 36 Cal.App.4th at pp. 795-796, conc. opn. of Nott, M; [italics added].)

Appellant submits that this is precisely the case in which to take such a stand. Given the nature of the individual offender combined with the minor nature of the instant offense, indicates the punishment provided under the "Three-Strikes" law is grossly disproportionate to appellant's individual culpability and the threat he poses to society. On the facts of this case, the sentence of 25 years to life constitutes cruel and unusual punishment.

C. The Penalty Is disproportionate When Compared With Punishment Prescribed In California For Other, More-Serious Offenses

Under the "Three-Strikes" law, appellant is not eligible for parole until he serves 25 years. (Pen. Code § 667, subd. (c) (5); People v. Stofle, supra, 45 Cal.App.4th at p. 421.) By contrast, someone who commits a cold-blooded premeditated murder with a deadly weapon receives a maximum sentence of

35 years to life (Pen. Code §§ 190, subd. (a) and 12022, subd. (b)) and is eligible for parole earlier than appellant. (In re Oluwa, supra, 207 Cal.App.3d at pp. 444-447.)

The penalty of 25 years to life imposed for appellant's offense, under the "Three-Strikes" law, is also greater than that statutorily prescribed for: rape, robbery, voluntary manslaughter, assault with a machine gun, carjacking, or burglary. (See Pen. Code, §§ 193, subd. (a), 211, subd. (a) (1), 215, subd. (b), 245, subd. (a) (3), 264, subd. (a), 459/460.)

The question then becomes whether it is cruel or unusual to impose a sentence of 25 years to life in this case. Appellant submits that it is. A person who commits premeditated murder with a deadly weapon is eligible for parole earlier than appellant. Under no principled analysis can appellant, who possessed a rock of cocaine weighing .10 grams, be viewed as having posed a greater danger to society than a first degree murderer. As stated in Dillon, "a comparison of the challenged penalty with those prescribed in the same jurisdiction for more-serious crimes . . . is particularly striking when a more serious crime is punished less severely than the offense in question . . ." (People v. Dillon, supra, 34 Cal.3d at p. 487, fn. 38, emphasis omitted; In re Foss 1974) 10 Cal.3d 910, 925-926.)

D. The Penalty Is Disproportionate When Compared With Recidivist Punishments In Other Jurisdictions

A comparison of the California "Three Strikes" law with recidivist statutes in other states shows that: wile California applies the same penalty to **any** current felony, many other states provides for varying increases in penalty. Greater increases are imposed where the current offense is more serious and lesser increases where it is less serious. (See, e.g., Ala. Code § 13A-5-9; Alaska Stats. § 12.55.155(a); Ariz. Rev.

Stats. § 13-604; Ark. Code Ann. § 5-4-501; Colo Rev. Stats. § 16-13-101; Conn. Gen. Stats. § 53a-40; Del. Code Ann., tit. 11, § 4214; Fla. Stats. Ann.§ 775.084; Ga. Code Ann. § 17-10-7; Hawaii Rev. Stats. §§ 706-606.5, 706-661; Ind. Stats. Ann. §§ 35-50-2-8, 35-50-2-8.5; La. Rev. Stats. Ann. § 15:529.1; Mich. Comp. Laws Ann. §§ 769.10-769.12; Mich. Stats. Ann., tit. 28, §§ 1082-1084; Miss. Code Ann., §§ 99-19-83; N.J. Stats. Ann. §§ 2C:44-3, 2C:43-7; N.Y. Pen. Law §§ 70.00-70.10; N.D. Cent. Code §12.1-32-09.)

In most other states that permit enhancement on the commission of a current felony of any type, there are limitations on the application of the statute that are absent in California. Thus, in Nebraska and Rhode Island, the first two convictions must have included a prison commitment (Neb. Rev. Stat., § 29-2221; R.I. Gen. Laws, § 12-19-21), and in Vermont, the statute applies only after conviction of four felonies (Vt. Stat. Ann., tit. 13, § 11).

Other states' recidivist statutes, which appear on their face be as Draconian as California's, in actual practice, are not enforced as rigidly as is California's. In Idaho, a third conviction of any felony requires a prison term of not less than five years, and the term may extend to life. (Idaho Code, § 19-2514.) However, that statute differs from California's because the Idaho sentencing courts have wide discretion within those bounds, whereas the California sentencing courts have no function but to mathematically compute the defendant's sentence. (State v. McPhie (1983) 104 Idaho 652v [662 P.2d 233, 237]; State v. Gauna (App.1989) 117 Idaho 83 [785 P.2d 647, 652-653].) More important, application of the recidivist statute is not mandatory; the court can sentence the defendant for the last-committed crime only, notwithstanding the prior record. (State v. Holton (App. 1991) 120 Idaho 112 [813 P.2d 923, 924].)

Further, unlike the California statute, under which consecutive sentences are mandatory (Pen. Code § 667, subd. (c) (6) - (8)), the Idaho courts retain discretion to sentence either consecutively or concurrently. (State v. Brandt (App.

1986) 110 Idaho 341 [715 P.2d 1011, 1016].) Finally, whereas 80 percent of the California sentence must be served, an Idaho defendant may be considered for parole after service of one-third of the sentence . (State v. Harrison (App. 1985) 108 Idaho 324 [699 P.2d 30, 31].)

In Washington, the statute provides a minimum ten-year sentence for a defendant with a current conviction involving fraud or petit larceny, and a prior felony or two prior misdemeanors, and a life sentence where the defendant has two prior felonies or four prior misdemeanors. (Wash. Rev. Code Ann., § 9.92.090.) However, unlike California (Pen. Code § 667, subd. (f), (g)), Washington prosecutors have discretionary charging power and may consider a wide range of factors in determining whether to file charges, as long as the exercise of the power is not arbitrary or capricious or based on indidious standards. (State v. Ross (1981) 30 Wash.App.324 [634 P.2d 887, 890].) Indeed, a statute providing that a habitual criminal allegation "shall" be filed in certain cases is directory, not mandatory. Otherwise, it would violate the defendant's right to due process. (State v. Rowe (1980) 93 Wash.2d 277 [609 P.2d 1348, 1351].)

In West Virginia, the statute provides a life sentence for a current felony conviction with two felony priors. (W.Va. Code, § 61-11-18.) However, there is parole eligibility after 15 years and the prosecutor has the power to exercise selectivity in enforcement, as long as the choice is not based on an unjustifiable standard such as race or religion. (Oyler v. Boyles (1962) 368 U.S. 448, 453 [7 L.Ed. 2d 446, 82 S.Ct. 501].)

In six states, the prosecuting attorney must make a special motion in order to seek an enhanced sentence under the recidivist statute. (Kan. Stat. Ann. § 21-4504; Ind. Code § 35-50-208.5 subd. (a); N.J. Stat. Ann. §§ 2C:44-3 & 2C:44-71]; R.I. Gen. Laws § 12-19-21, subd. (b); S.C. Code Ann. § 17-25-45, subd. (2); Va. Code Ann. § 19.2-297.1, subd. B.) In contrast, section 667, subdivisions (f) (1) and (f) (2) **require** the prosecutor to plead and prove each prior felony conviction.

The only exceptions are for insufficient evidence or for the furtherance of justice.

In sum, other than California, there appears to be no state with a recidivist statute that requires such mandatory application and length imprisonment regardless of any circumstances in mitigation. Moreover, even if there were several other states with measures as Draconian as California's Three-Strikes statute, that would not save the California statute. As stated in Lynch, "if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness." (In re Lynch, supra, 8 Cal.3d 15 p. 427, emphasis added.)

E. Conclusion and Suggested Disposition

The constitutional provision against cruel or unusual punishment is, itself, a vital part of the law, which this Court should apply in this case. In so doing, the Court would not be ignoring the law of California; it would be applying the whole law. (People v. Dillon, supra, 34 Cal.3d at p. 494, conc. opn. of Kingsley, J.) Since the Legislature and the voters have failed to bring the "Three-Strikes" legislation into line with the well-accepted criteria of individual accountability and proportionate punishment, which is constitutionally compelled, this Court should do it for them. (People v. Dillon, supra, 34 Cal.3d at pp. 488-489.)

Appellant's history is far from perfect. However, there is no imaginable history of recidivism that would prevent a life sentence from being cruel and unusual under these circumstances. Therefore, when the court remands this case for resentencing it should instruct the trial court to impose a lesser sentence.[11/]

---

11. In Dillon, the Supreme Court modified the judgment

IV.

THIS MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT DID NOT ADEQUATELY CONSIDER THE RELEVANT CRITERIA UNDER ROMERO IN EXERCISING ITS DISCRETION TO STRIKE APPELLANT'S PRIOR SERIOUS FELONY CONVICTIONS PURSUANT TO SECTION 1385

At appellant's sentencing hearing on October 10, 1996, appellant's counsel requested the court to strike one of appellant's prior "strike" convictions. Following extensive argument by the prosecutor and appellant's counsel, the court denied appellant's motion and made the following comments:

> THE COURT: . . .Ms. Nachman, the record reflects that the motions that you referred to having to do with the prior convictions were previously heard and denied on the 26th of August.[12] That was

---

by reducing the degree of the murder from first to second. (People v. Dillon, supra, 34 Cal.App.3d at p. 489.) In the instant case, appellant suggests that his sentence be modified (see section 1260) to the maximum allowable if his case did not fall under the "Three-Strikes" law.

12. On August 26, 1996, prior to trial, the court summarily denied appellant's motion to strike a prior

> prior to the Romero case being decided; However, I do not see that this is an appropriate case for the court to exercise its discretion.
>
> As Ms. Kaplan pointed out, the defendant, although he was convicted in 1982 of the two from parole for those very same convictions in June of 1992. And in July of 1993, he was rearrested for a subsequent felony and was on parole for that felony when this offense was committed. (R.T. 264-265.)

As will be demonstrated, this matter must be remanded for resentencing because the trial court's statements clearly demonstrate it did not adequately consider all of the relevant criteria under Romero in exercising its discretion to strike appellant's prior serious felony convictions pursuant to section 1385.

As this Court is aware, the California Supreme Court recently concluded in People v. Superior Court (Romero), supra, 13 Cal.4th 197, that a trial court may, on its own motion, dismiss prior strike conviction allegations in the furtherance of justice. (Id., at p. 530.)

The Romero decision is fully retroactive. Regarding the disposition of cases where Three Strikes sentences have been imposed, footnote 13 states the following:

> A defendant serving a sentence under the Three Strikes law imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice

---

conviction. (C.T. 52; R. T. 3A.)

> pursuant to section 1385(a), may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for habeas corpus to secure reconsideration of the sentence. (People v. Superior Court (Romero), supra, 13 Cal.4th at p. 530, fn. 13;Cal.4th' see mod. opn. 13 Cal.4th 1026a.)

In the instant case, on October 10, 1996, the court denied appellant's motion to strike his prior convictions. In denying appellant's motion, the court relied on appellant's past criminal record as the sole basis for denying appellant's motion. (R.T. 264-265.)

A review of the sentencing transcript clearly demonstrates the court did not properly exercise its discretion utilizing the three factors mandated by the California Supreme Court in People v. Superior Court (Romero), supra, 13 Cal.4th at p. 497. Romero expressly specified the circumstances to be considered by the sentencing court when receiving evidence and deciding whether or not to exercise discretion under Penal Code section 1385, subdivision (a). (People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531, citing with approval People v. Dent, (1995) 38 Cal.App.4th 1726, 1731.) The trial court may, on its own motion, dismiss prior felony convictions alleged as "strikes," in the furtherance of justice, after receiving and considering evidence relevant to **all** of the following:

> 1. **the circumstances of the commission of the current felony** ;
>
> 2. the nature of the offender including the offender's criminal history in its entirety and its recency, and, his or her personal traits, e.g., age, maturity, substance abuse, if any, family background/childhood; and

> 3. **then making an "individualized" determination based on the circumstances of the case and the offender before it**. (Id; [emphasis added].)

'""Furtherance of justice," requires consideration both of the constitutional rights of the defendant, and the *interests of society represented by* the People, in determining whether there should be a dismissal. [Citations.]' At the very least, the reason for dismissal must be 'that which would motivate a reasonable judge.' [Citations.]." People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531.)

In the instant case, the court only utilized the second criteria set forth in Romero; namely, appellant's criminal history. (People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531.) The court did not consider the first factor listed by Romero: the circumstances of the commission of the current felony offense. This factor was significant in this case because appellant possessed a rock of cocaine weighing .10 grams – hardly a usable amount. (R.T. 148.)

The court also did not consider the third factor listed by Romero: the making of an **"individualized"** determination based on the circumstances of the case and the offender before it. (People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531.) This factor was also significant because appellant's "strike" convictions occurred in "one swing" in 1982 when appellant was 21 years old. (C.T. 15, 154, 156.)

More importantly, the record does not *clearly* indicate that the trial court would not, in any event, exercise its informed discretion using the three express factors outlined by the Supreme Court in Romero. Rather, it relied *solely* on appellant's past criminal record. (R.T. 264-265.) The fact that the court only considered appellant's criminal history underscores the fact that the court did not comport with the discretionary requirements of Romero.

given the state of the record, it cannot be said with any certainty how the Superior Court would exercise its informed

discretion using the Romero criteria. A contrary opinion that this record **does** contain such a clear indication must necessarily be based on two assumptions: one, that the trial court exercised its discretion after hearing all of the available evidence in mitigation; and, two, that defense counsel presented all of the available evidence in mitigation. Neither of these two assumptions are supported by this record.

By ignoring the clear dictates of the Supreme Court in Romero, this Court would, in actuality, be "speculating" what the Superior Court would do. This is improper and is exactly why remand is appropriate. By analogy, it has been recognized that a vice in the complete failure by the trial court to state reasons for its sentencing choices is that any attempt to ascertain its effect calls for compound speculation and subjective assumptions about the trial court's mental processes. (See People v. Reiley (1987) 192 Cal.A00.3d 1487, 1491 [refusing to "speculate on the probability the court will impose the same sentence on remand"].) Here, without any indication of the trial court's intention in striking appellant's prior convictions using the three express factors listed in Romero, one can only speculate as to how it would rule.

In In re Cortez (1971) 6 Cal.3d 78, the California Supreme Court addressed the question of whether or not a court could properly summarily deny a petition for writ of habeas corpus asking the trial court to resentence him in light of the then-recent decision in People v. Tenorio (1970) 3 Cal.3d 89. In a thoughtful opinion, Justice Sullivan explained the tangible problems with surmising what a court would have decided based on the hypothesis that it received all of the information that would have been presented on the question. (Id., at pp. 85-89, specifying proper procedure; p. 86 fn. 8, cited in Romero at p. 516.)

> Retroactivity in this context implies an unraveling of time backwards until the original situati9n is exposed and an

> application of the prescribed ameliorative procedures to the reconstructed scene. Since obviously it is impossible to peel off the layers of past time like those of an onion, we are compelled to simulate and reconstruct the event as accurately as possible in the present and under inevitably changed circumstances. The event we must reconstruct in order to effect Tenorio relief is the opportunity for a convicted narcotics defendant to attempt to persuade the sentencing judge, now released from the restrictions of section 11718, to strike a prior convictic ', thereby reducing the prison term prescribed by law and, in some instances, making the defendant eligible for probation. (Ibid., at p. 85.)

More recently, in People v. Superior Court (Alvarez), supra, 14 Cal.4th 968, the California Supreme Court, in addressing the scope of Penal Code section 17, subdivision (b) discretion in Three Strikes cases, stated, "[S]ince all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including the 'nature and circumstances of the current offense, the defendant's appreciation of and attitude during the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.]" (Id., at p. 978.) The court also noted that "[T]o judicially mandate that a single factor predominate the trial court's exercise of discretion would eviscerate the essence of it's statutory authority; indeed, it would be one step shy of declaring the three strikes law eliminates the court's discretion entirely." (People v. Superior Court (Alvarez),

supra, 14 Cal.4th at p. 979.)[13/]

Similarly, in the instant case, the trial court, by relying solely on appellant's past "strikes" and not considering the minor nature of the present offense, and the fact that appellant's last "strike" offenses occurred in "one swing" in 1982, ignored the clear dictates of Romero, and did not properly exercise it's authority under section 1385. (People v. Superior Court (Alvarez), supra, 14 Cal.4th at p. 979.)

As Justice Sullivan spelled out in detail in Cortez, there are specific constitutional, procedural due process rights attendant to the pronouncement of judgment: "[It] . . . is a critical stage in the criminal prosecution when the

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13. Alvarez also stated that when appropriate, judges should consider the general objectives of sentencing set forth in California Rules of Court. (Id., at p. 479.) California Rules of Court, rule 410 states as follows:

> General objectives of sentencing include: [¶] (a) Protecting society. [¶] (b) Punishing the defendant. [¶] (c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses. {¶] (d) Deterring others from criminal conduct by demonstrating its consequences. [¶] (e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration. [¶] (f) Securing restitution for the victims of crime. [¶ (g) Achieving uniformity in sentencing. [¶] Because in some instances these objective may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case. [¶] The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.

constitutional rights to 'appear and defend, in person and with counsel' (Cal. Const., art. I, §13 [formerly, now §15]) apply . . . ." (In re Perez (1966)65 Cal.2d 224, 229 [parallel citation omitted].) A defendant convicted of a felony has the right to be present at the pronouncement of judgment (Pen. Code, §1193); to be represented by counsel (Mempa v. Rhay (1967) 389 U.S. 128 [19 L.Ed.2d 336, 88 S.Ct. 254]; In re Perez, supra, 65 Cal.2d 224); and to receive a hearing at which he may present evidence with respect to mitigation of sentence (Pen. Code § 1204.)" (In re Cortez, supra, 6 Cal.3d t p. 88.)

In order for Justice Sullivan's words to have any force or effect, appellant's sentencing hearing on October 10, 1996, must have been conducted in front of a judicial officer who heard that evidence with the open-mindedness, responsibility and accountability of a judge who actually KNEW and UNDERSTOOD the parameters of the trial court's discretion under Romero.

Where as here, a sentence was imposed without full application of discretionary sentencing choices, it violates the due process clause of the Fourteenth Amendment of the United States Constitution. "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (People v. Belmontes (1983) 34 Cal.3d 335, 348, fn. 8,[14/] citing United v. Tucker (1972) 404 U.S. 443, 447 [30 L.Ed.2d 592, 596, 92 S.Ct. 589] [sentencing based upon prior, unconstitutional convictions violates due process]; see also, Hicks v. Oklahoma (1980) 447 U.S. 493 [65 L.Ed.2d 175, 100 S.Ct. 2227] [defendant has Fourteenth Amendment liberty interest protected by due process in state's sentencing procedures, where defendant had statutory right to be sentenced by jury]; Payton v. Whitley (5th Cir. 1991) 941 F.2d 1321, 1322 ["due process is violated when a sentencing judge or jury is unaware of discretionary

---

14. In footnote 13, the Romero opinion cited Belmontes, footnote 8, for its full retroactivity holding.

sentencing alternatives"]; Terrebone v. Butler (5th Cir. 1988) 848 F.2d 500, 507, fn. 13 [erroneous imposition of "mandatory" life sentence in ignorance of discretionary alternatives may violate due process clause of Fourteenth Amendment].) "A court which is unaware of the scope of its discretionary powers is no more exercising that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (People v. Belmontes, supra, 34 Cal.3d at p. 348, fn. 8, emphasis added.)

Appellant submits that this court should refrain from judging facts, in the abstract or otherwise, and from speculating, based an incomplete, deficient sentencing hearing, what a reasonable sentencing judge would do if he had made a decision only after considering all the circumstances in mitigation.

Based on the foregoing, in following Romero, appellant respectfully submits this case should be remanded to the trial court for resentencing, with directions to afford appellant a de novo hearing pursuant to Penal Code section 1204, at which appellant is personally present and represented by counsel; a new probation report should be prepared addressing the exercise o judicial discretion pursuant to Penal Code section 1385, subdivision (a), and the principles articulated and factors to be considered as identified by the Supreme Court in Romero; then, after duly considering that full and complete record, the trial court can reach its decision whether or not to exercise its discretion to strike one or both of the "strikes" against appellant to reduce his sentence to a reasonable period of time for the crime he currently committed, in light of his personal and criminal background, the circumstances of the present offense, and the real need, if any, for society to sequester him for the remainder of his natural life.

CONCLUSION

Based on the foregoing, appellant respectfully submits that the judgment of conviction and sentence should be reversed. Alternatively, this matter must be remanded for resentencing.

DATE: May 2, 1997 Respectfully Submitted,

/ S /

SYLVIA KORYN

Attorney for Defendant-Appellant

STEVEN M. COLLINS

PROOF OF SERVI CE BY MAIL

I, DANIELLE MOLINEUX, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 1223 Broadway Street, Suite 101, Santa Monica, California 90404.

On May 2, 1997 I served the within

APPELLANT'S OPENING BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States Mail at Los Angeles, California addressed as follows:

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I deposited said envelopes in the mail at Santa Monica, California.

/ s /

DANIELLE MOLINEUX

APPENDIX K

Former § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court

proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

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In The Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

v.

STEVEN MARTELL COLLINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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FEDERAL STATUTES

28 U.S.C. § 2254 ..... *passim*

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MISCELLANEOUS

Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.) 48, 49

Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. Pub. Int. L.J. 135 (1996) 36, 49

STATEMENT OF THE CASE

I. The Trial

Respondent Steven Collins ("Collins"), an African-American man, JA II 11,[1] was tried in the Los Angeles County Superior Court for possessing 0.10 grams of rock cocaine. PA 109-10. After a jury found Collins guilty and determined that he had been convicted of two prior felonies, PA 95-96, 109-10, the court sentenced Collins to a term of 25 years to life in prison under California's Three-Strikes Law. PA 96, 110.

Challenges for cause and hardship excuses left only three African-Americans on the panel. JA 36. After a judge-conducted voir dire, counsel were asked to exercise their peremptory challenges. JA 150. The prosecutor struck Juror 16, a female African-American juror. JA 168; JA II 3. Juror 16 stated during voir dire that she lived in Inglewood, was single, had no children, was employed as an automations clerk for the Federal Aviation Administration, and had no prior jury experience. JA 142. None of Juror 16's recorded responses to voir dire gave any reason to suspect she would be sympathetic toward the defense: She said that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to be a juror in this case; that she could decide the case solely on the evidence and instructions without regard to her personal feelings; that no one close to her had ever been accused of committing any crime that involved the use or possession of drugs or drug paraphernalia; that she thought the possession of rock cocaine

[1] "JA" refers to Volume I of the Joint Appendix filed by the parties. "JA II" refers to Volume II of the Joint Appendix. "PA" refers to the appendix submitted with the petition for writ of certiorari.

ought to be against the law; and that neither she nor anyone close to her had ever had a problem with drug or alcohol abuse. JA 139-45.

The prosecutor used her next peremptory to challenge the only other black woman in the venire, Juror 19. JA 183; JA II 3. Juror 19 was single, lived in Inglewood, and was a retired nurse with seven grown children and five grandchildren. JA 156-58. She also responded to voir dire in a manner that, if viewed race-blind, should have raised no red flags for the prosecution. She stated that she had never had an experience with police officers that was "particularly positive or particularly negative." JA 157. Although her youngest daughter had previously had a problem with drugs,[2] she had been clean for two years, JA 158, she had not been arrested, and Juror 19 was adamant that nothing about her relationship with her daughter or what her daughter had gone through might affect her ability to be impartial in this type of case. JA 159.[3]

When the prosecutor used a peremptory to strike this second black juror, defense counsel made a *Batson* motion, explaining that "the last two jurors excused by the People [Jurors 16 and 19] have been African-Americans." JA II 3.[4] The prosecutor replied:

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[2] When asked what kind of drugs was involved, she initially said she had no idea, but then quickly stated she thought the drug was cocaine. When asked if the drug was rock cocaine, she said "no." JA 158.

[3] Juror 19 also stated that she could put her daughter's situation aside and be as objective as any other juror. JA 159.

[4] Collins made his objection pursuant to *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the California state law analogue to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 (9th Cir. 2003). This brief refers to Collins's jury discrimination challenge in state court as a *Batson* motion or claim.

> We have, it appears to me, two people of color, African-American type, left on the jury. I have excused two white people and two black people. I don't think there has been any particular people that have been excluded. . . . So it is not like I am picking on any certain minority. I don't think there has been a sufficient showing.

JA II 4. This comment neglected to address the fact that the prosecutor had struck two of the three African-Americans remaining on the panel. The judge ruled that a prima facie case had been made and asked the prosecutor for her explanations. JA II 4-5.

The prosecutor first asserted that both Juror 16 and Juror 19 were young (JA II 5) – a remarkably inaccurate contention with respect to Juror 19, who had described the occupations of five of her grown children and stated that she had five grandchildren. JA 156-58. The prosecutor then threw in another objection to Juror 16:

> Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court.

JA II 5.

Next the prosecutor appears to have confused the two black jurors with each other. Immediately after describing Juror 16's demeanor, the prosecutor stated: "She and Mr. 006 were both single, no ties." JA II 5. At this point, defense counsel evidenced confusion, asking "who is 006?" and the prosecutor replied,

> He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a

> daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

JA II 5-6.

In response to the court's question whether she had additional justifications, the prosecutor introduced a new variable, gender, by asking: "Does the court need cases for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area?" JA II 8. When defense counsel objected to the consideration of gender, JA II 9, the court observed that "the United States Supreme Court say[s] that the use of peremptory challenges based on gender is improper." JA II 12-13. The court then admonished the prosecutor, "I don't see, Ms. Satriano, that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it." JA II 13. The prosecutor backtracked, and returned to reliance on youth, then backtracked again by admitting that she had not struck other young jurors:

> I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

Id.

This ping-ponging among reasons did not deter the court from ruling for the prosecutor. With respect to Juror 19, that ruling was uncomplicated: "[B]eginning with [Juror 19], the court is satisfied that at least one race and gender neutral explanation was offered for the exercise of

that peremptory challenge, that being [Juror 19's] experiences with a family member who had a drug problem." JA II 14. With respect to Juror 16, the court began with candor and ended with charity:

> With regard to [Juror 16], the court, frankly, did not observe the demeanor of [Juror 16] that was complained of by the district attorney; however, [Juror 16] was a youthful person, as was [Juror 6]. And one or more prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to [Juror 16].

JA II 14-15.

The court then added that the denial was without prejudice to Collins's right to renew the motion, cautioning that "both parties are reminded that if the court does grant a [*Batson*] motion, the court is required to report its reasons to the State Bar of California." JA II 15. After this warning, the prosecutor exercised her remaining peremptory challenge against a white juror, leaving one African-American man on the panel.[5]

II. The State Appeal

On appeal, Collins challenged the denial of his *Batson* motion as to Juror 16, but not as to Juror 19. PA 179.[6]

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[5] Although the prosecutor suggested that two jurors were African-American (JA II 3), defense counsel clarified that although Juror 20 may be a woman of color, as the district attorney stated, "she is not African-American." JA II 11. Collins's traverse states that Juror 20 was Indian (Asian Indian), not African-American. *See* C.D. Cal. docket entry 42 at 6.

[6] Collins's federal petition similarly asserts a *Batson* claim solely with respect to Juror 16. Under *Batson*, the prosecutor's peremptory strike of Juror 19, and the reasons given therefore, are relevant

(Continued on following page)

Collins argued that the trial court denied the motion "solely based on the fact that [Juror 16] was young" (PA 191), and that the court failed to make a sincere and reasoned attempt to evaluate the prosecutor's explanations. PA 187.[7]

The California Court of Appeal affirmed the judgment. PA 109, 120. It held that youth was not a forbidden, cognizable class for the purposes of *Batson*, and stated that "peremptory challenges to youthful and/or immature prospective juror[s] repeatedly have been upheld as proper. [Citations omitted.] Thus, [it] f[ou]nd no merit to Collins's assertion [that] [Juror 16] was excluded from the jury based on her age." PA 115-16. The court further held:

> Additionally, even if the prosecutor's reliance on [Juror 16's] youth were improper, the prosecutor also stated the prospective juror had rolled her eyes and turned away from the trial court when the trial court spoke to the prospective juror. The trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt.
>
> Based on this evidence, the prosecutor's use of a peremptory challenge as to [Juror 16] was proper. . . . Because the prosecutor reasonably

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evidence on the issue of her intent to discriminate in striking Juror 16. *See infra*, Argument § I.A.

[7] The State suggests that in his postconviction challenges, Collins did not claim that the strike of Juror 16 was impermissibly based on race until his Ninth Circuit appeal. Petitioner's Brief on the Merits ("Pet. Br.") at 7-8. This is incorrect. Collins argued on direct appeal and in district court that the strike was racially discriminatory. PA 193 (arguing in his state appeal brief that "the prosecutor's reasons for excusing prospective juror #16 were insufficient to show that racial animus did not exist"); PA 101.

> could have interpreted [Juror 16's] body language as indicative of hostility or disrespect, a peremptory challenge exercised on that basis was not improper.

PA 116.

The court rejected the claim that "the trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's justifications," PA 116, reasoning that "[b]ecause nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to [Juror 16's] demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." PA 116-17 (citation omitted). Collins filed a petition for review in the California Supreme Court, which was denied without comment. PA 96.

III. The Federal Habeas Action

Collins's petition for writ of habeas corpus in federal district court asserted that the prosecutor's peremptory challenge of Juror 16 violated *Batson*. Collins represented himself *pro se* throughout the district court action, and not surprisingly, presented no additional evidence in support of his *Batson* claim. Consequently, the district court adjudicated the claim solely on the basis of the state court record.

A United States Magistrate Judge issued a report recommending that the *Batson* claim be denied and the petition be dismissed with prejudice. PA 95, 105. Despite the fact that the trial judge neither commented on nor made a finding concerning the "sincerity" of the prosecutor's explanation, the Magistrate Judge ruled that "[a]lthough the trial judge did not personally observe the

juror 'roll' her eyes, he made a finding that the prosecutor's proffered explanation was sincere and legitimate, and this Court must respect that finding unless it is rebutted by petitioner with clear and convincing evidence." PA 104. Ignoring the oscillations in the prosecutor's reasons, the Magistrate Judge also opined that "there is no indication in the record that the prosecution's age-related justification was a mere pretext for racial discrimination." *Id.* The district court adopted the report verbatim and dismissed the petition with prejudice. PA 91.

The Ninth Circuit Court of Appeals reversed the district court and granted relief, holding that the California Court of Appeal's decision represented an unreasonable determination of the facts and was an objectively unreasonable application of clearly established federal law. JA 35; 28 U.S.C. § 2254(d)(1), (2).

SUMMARY OF ARGUMENT

After the prosecutor used consecutive peremptory strikes to remove the only two African-American women remaining in the venire, Jurors 16 and 19, Collins made a *Batson* motion. The court found a prima facie case and asked the prosecutor to justify her strikes. Although the prosecutor initially asserted that both jurors were young (in fact, Juror 19 was a grandmother), she ultimately withdrew the rationale, saying that "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Upon questioning by the court, the prosecutor zigged and zagged from reason to reason, offering a litany of rationales that she claimed applied to both jurors, including youth, gender, "lack of ties in the community," and that they were "too tolerant" to serve in a drug case. In fact, aside from race, gender

and where they lived, Jurors 16 and 19 were quite disparate. They differed in age (youthful v. grandmother); occupation status (employed v. retired); number of children (none v. seven); and friends and relatives with drug problems (none v. a daughter). The prosecutor also claimed that after a statement made by the judge, Juror 16 "rolled her eyes and turned away from the court." The trial court denied the *Batson* motion, stating that he had not observed the demeanor complained of, but that Juror 16 was "a youthful person," as were other prospective jurors, and "[t]he court is prepared to give the district attorney the benefit of the doubt as to [Juror 16]."

The rule that reviewing courts should defer to findings of fact by the trial court is based on the premise that the trial court is in the best position to observe matters that may not be as readily discerned from the written record, such as the demeanor of witnesses. Application of the rule assumes that the trial court indeed assessed the relevant evidence and made a fact finding. Here, the trial court gave the prosecutor "the benefit of the doubt" that she was not discriminating and warned that any future *Batson* violations would be reported to the state bar. Assuming this even counts as a finding of no discrimination, it is far from clear, firm or persuasive. The trial judge also stated that he had not observed the demeanor alleged by the prosecutor; he affirmed, however, that Juror 16 was "a youthful person," as the prosecutor claimed, and gave the prosecutor "the benefit of the doubt" as to her strike of Juror 16 on that basis.

Standing the rule of deference to trial court factfinding on its head, the state appellate court "deferred" to a credibility determination the trial court never made. The court ruled that "[b]ecause nothing in the present record,

including the trial court's decision to give the prosecutor the benefit of the doubt as to [Juror 16's] demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." Repeating the trial court's error, the appellate court also affirmed the denial of the motion on the basis of the withdrawn youth rationale. Neither ground of the state court decision is supported by the record.

In granting relief on the *Batson* claim, the Ninth Circuit faithfully applied this Court's teaching in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"). It reviewed "all relevant circumstances" to assess the credibility of the prosecutor's justifications, and it applied the "unreasonable determination" standard of 28 U.S.C. § 2254(d)(2) and the "presumption of correctness" standard of § 2254(e)(1). The court rightly held that the state appellate decision represented an unreasonable determination of the facts because the record showed that the prosecutor failed to offer any credible justification for striking Juror 16. Instead, the record showed by clear and convincing evidence that, of the reasons given to strike Juror 16, one (gender) was illegal; a second (youth) was withdrawn and had not been applied to white panelists; a third ("too tolerant" to sit in a drug case) was contrary to the record and not applied to similarly situated white jurors; a fourth (single) was not applied to a similarly situated white juror; a fifth (lack of ties to the community) was unsupported by the record; and the sixth (demeanor) was uncorroborated by the trial judge and pretextual in light of all the relevant circumstances. The court also held that the state court unreasonably applied *Batson*. 28 U.S.C. § 2254(d)(1). This Court should affirm the Ninth Circuit judgment.

The State proposes a different, more deferential standard to apply to habeas claims than the one this Court applied in *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) ("*Miller-El II*"), last term, and which the Ninth Circuit applied here. The State claims that 28 U.S.C. § 2254(d)(2) and (e)(1) both should be read as containing the sufficiency of the evidence standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). Had Congress intended federal habeas courts to apply the *Jackson* standard, it would have included it in the habeas statute. Congress did not do that. The State's proposal is inconsistent with the plain language of the habeas statute and with this Court's cases construing the statute. The State has not cited one case in which a court has read (d)(2) or (e)(1) as prescribing a *Jackson* kind of review.

Contrary to the State's position, the structure and text of the habeas statute show that (d)(2) and (e)(1) are mutually exclusive provisions that do not apply to the same claim. Subsection (d)(2) applies to situations, as here, where the petitioner challenges state court fact determinations solely on the basis of the state court record. Subsection (e)(1) applies only when the petitioner presents new evidence in federal court in support of his claim. Thus, § 2254(e) contemplates that if a petitioner meets the standard for obtaining a federal evidentiary hearing, he can present new material to try to overcome the presumption of correctness by clear and convincing evidence. However, if the petitioner makes a challenge under (d)(2) based solely on the state court record, (e)(1)'s presumption of correctness and clear and convincing rule do not apply.

ARGUMENT

I. THE CALIFORNIA COURT OF APPEAL'S DENIAL OF THE *BATSON* CLAIM WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS

Collins filed his federal habeas corpus petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore AEDPA applies to his case. *Woodford v. Garceau*, 538 U.S. 202, 207 (2003). 28 U.S.C. § 2254(d), as amended by AEDPA, "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000). The first issue in a case in which AEDPA applies is whether the petitioner has established a constitutional violation and therefore a right to habeas relief. If he has not, § 2254(d)'s limitations on the power to grant relief never come into play. *Weeks v. Angelone*, 528 U.S. 225, 237 (2000) (when petitioner's constitutional claim fails, it follows *a fortiori* that the state court denial of the claim is neither contrary to nor an unreasonable application of federal law under (d)(1)).[8] If, however, the petitioner proves a constitutional violation, the issue then becomes whether § 2254(d) nevertheless precludes habeas relief. As shown below, Collins has established a *Batson* violation.

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[8] As explained in § III, *infra*, 28 U.S.C. § 2254(e)(1) is not applicable to this case because the federal habeas courts adjudicated Collins's *Batson* claim based solely on the state court record.

A. Applicable *Batson* Principles

Batson held that equal protection forbids prosecutors from using peremptory challenges on the basis of a juror's race. 476 U.S. at 89. *Batson* established a three-step test for evaluating claims that a prosecutor used a peremptory strike in violation of equal protection. *Miller-El I*, 537 U.S. at 328. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California*, 125 S. Ct. 2410, 2416 (2005).

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." *Johnson*, 125 S. Ct. at 2416. "'At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation.'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). This step "does not demand an explanation that is persuasive, or even plausible." *Id.*

Third, if the state provides a race-neutral justification, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98 (footnote omitted). "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338-39. At step three, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768.

"In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" and consider all relevant circumstances. *Batson*, 476 U.S. at 93; *Miller-El II*, 125 S. Ct. at 2325; *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (pl. op.) ("[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts"). Thus, "*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El II*, 125 S. Ct. at 2331.

Here, the trial court found a prima facie case (step one), and the prosecutor gave a facially race-neutral justification (step two). The dispute centers on whether an examination of all of the relevant circumstances shows that the prosecutor engaged in purposeful discrimination in striking Juror 16 (step three) and, if so, whether § 2254(d) nevertheless precludes relief.

B. A Consideration of All Relevant Circumstances Shows that the Prosecutor Purposefully Discriminated in Striking Juror 16

The California Court of Appeal ruled that the prosecutor gave two proper reasons for striking Juror 16: Juror 16's youth and her "eye-rolling" and "turning away." PA 115-16. The trial court found that the prosecutor gave one proper justification: youth. JA II 14-15. Collins addresses the youth justification first, then the demeanor rationale.

1. The Youth Justification Does Not Support the Strike

a. The Prosecutor Withdrew Youth as a Justification and Instead Equated Youth with Being "Too Tolerant" and "Lacking Ties in the Community"; Even if the Youth Rationale Was Not Withdrawn, It Was Pretextual

Although the prosecutor initially identified youth as a basis for challenging Jurors 16 and 19, upon questioning from the court she effectively abandoned that rationale. The record shows that the prosecutor equated youth with (1) being too tolerant to serve in a drug possession case and (2) lacking ties in the community, rationales the state trial and appellate courts never mentioned in their rulings as to Juror 16.

After the trial judge stated that a challenge based on gender was not "going to cut it," the prosecutor explained:

> I think I tied that into a lack of ties in the community with both of them [Jurors 16 and 19]; that that was one factor that I considered, that is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

JA II 13; *see also* JA II 5 ("Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case."). Since the prosecutor withdrew youth as a reason supporting her peremptory challenge, youth cannot be used as a basis to sustain the strike. *Miller-El II*, 125 S. Ct. at 2332 (A "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reason he gives. . . .

If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."); *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) (en banc) ("The inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court, not on all possible distinctions we can hypothesize.").

Even assuming youth was not withdrawn, by the prosecutor's own admission it does not explain the strike of Juror 16 (or 19): "It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Further, consideration of all of the relevant circumstances – including the reasons given for striking the only other black female panelist, Juror 19 – shows that youth was a pretext for discrimination.

The trial judge described Juror 16 as "a youthful person," JA II 14, but the record shows that Juror 19 "was at least a middle-aged grandmother." JA 54.[9] Juror 19 stated in voir dire that she was a retired nurse and had seven children (at lease five of whom were adults) and five grandchildren. The prosecutor's incorrect portrayal of Juror 19 as young is evidence that she used youth as a pretext for discrimination. *Miller-El II*, 125 S. Ct. at 2327 (finding discrimination where prosecutor mischaracterized struck juror's voir dire answers); *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998) (serious questions of pretext arise when facts in record are objectively contrary to prosecutor's justifications).

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[9] Like the rest of the prospective jurors, Jurors 16 and 19 never gave their age or were asked to give their age. The judge never described Juror 19's appearance on the record.

The State contends that the prosecutor merely misspoke when describing Juror 19 as young, accidentally referring to her "at one point" as Juror 6, a white man. Pet. Br. at 39-40. But the prosecutor's statement that "Ms. 016 as well as Ms. 019 were both young" was her immediate response to the court's request that she justify her "peremptory challenges of Ms. 019 and Ms. 016," and came before any discussion of Juror 6. JA II 4-5. Later in this discussion, the prosecutor said that Juror 16 and "Mr. 006 were both single, no ties." JA II 5. When the court subsequently stated that strikes based on gender were not "going to cut it," the prosecutor again said "that their youth was important." JA II 13. She could only have been referring to Jurors 16 and 19, since they were the subject of Collins's motion and there was no claim Juror 6, a man, was struck because of his gender. The prosecutor's statements were implausible, but not accidental.

The State suggests that the prosecutor's strike of Juror 6, a young white man, shows that the prosecutor did not discriminate in striking Juror 16. Pet. Br. at 39. However, the record shows that Jurors 6 and 16 were not similarly situated. Juror 6, unlike Juror 16, was unemployed (indeed, had never been employed) and had an uncle who was a recovered alcoholic (JA 108, 126), reasons for a strike that did not apply to Juror 16 and facts indicating the pretextual nature of the strike of Juror 16.

In addition to striking Jurors 6, 16 and 19, the prosecutor also struck Jurors 8 and 22. JA 150, 199-200.[10] In accepting the youth justification, the trial court noted that, in addition to Jurors 6 and 16, "one or more prospective

[10] Jurors 6 and 8 were struck before the *Batson* hearing; Juror 22 was struck afterwards. JA 150, 160, 199-200.

jurors also" were youthful. JA II 14. The court did not explain whether it was referring to other prospective jurors who were struck by the prosecutor, and the record does not reflect the ages of any venire members. However, the record does show that even assuming that Jurors 8 and 22 were youthful, they were not otherwise similarly situated to Juror 16, and therefore their strikes do not legitimize the strike of Juror 16.

Juror 8 stated that she had served as a juror in a criminal case for driving under the influence that did not reach a verdict. JA 109. She had two friends with drug and/or alcohol problems; substance abuse was an ongoing problem with one friend, and she was not sure if it was ongoing with the other. JA 125. Juror 8 had doubts about her ability to be fair and impartial and had heard that drug dealing occurred in her neighborhood. JA 125, 128. Juror 22 stated that she had had both a particularly positive and a particularly negative experience with a police officer and had a brother and a cousin who had problems with alcohol. JA 169-70. Juror 16's voir dire answers on these topics are strikingly dissimilar from those given by Jurors 8 and 22, and even assuming Jurors 8 and 22 were youthful, the prosecutor's strikes against them do not show that youth was a persuasive, or even plausible, reason for striking Juror 16.

b. The Justifications of "Tolerance" and "Lacking Ties in the Community" Were Pretextual

Juror 16's voir dire answers show that she should have been an ideal juror in the prosecutor's eyes as far as her purported tolerance toward drug users. *Miller-El II*, 125 S. Ct. at 2329. Juror 16 stated that there was nothing

about the nature of the charge of possession of rock cocaine that might make it difficult for her to be a juror; that no one close to her had ever been accused of committing a crime that involved the possession of drugs or drug paraphernalia; that she thought the possession of rock cocaine ought to be against the law; and that neither she nor anyone close to her had ever had a problem with drug or alcohol abuse. There is no evidence in the record that remotely suggests that Juror 16 was tolerant of or sympathetic to persons involved with drugs, and the prosecutor did not try to solicit additional information from her on this topic. *Miller-El II*, 125 S. Ct. at 2327, 2330 n.8 (failure to ask questions on ground later used for strike "undermines the persuasiveness of the claimed concern"). The tolerance justification is implausible and contrary to the evidence in the record. *Id.* at 2329 ("the credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy' ").

A comparative analysis further highlights the pretextual nature of this rationale. If tolerance in a drug possession case is shown, at least in part, by having friends or relatives who abused drugs or alcohol and/or had drug or alcohol-related arrests – as the prosecutor suggested with respect to Juror 19 – then at least three white jurors were tolerant, yet none was stricken by the prosecutor.[11]

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[11] JA 118-19 (Juror 4's father was arrested on a drug charge and had been a recovered alcoholic and drug addict for 30 years); JA 144 (Juror 17's oldest son "had a drunk driving years ago"); JA 197-98 (Juror 30's older son had a cocaine problem from his late teens until mid-20s, but has been clean since going into drug rehabilitation); *see also* JA 201-02 (Juror 31's wife was an emergency room nurse who discussed with Juror 31 her work with persons who had overdosed on drugs).

Miller-El II, 125 S. Ct. at 2330 ("The fact that [the prosecutor's] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.").[12]

The prosecutor also justified her strikes of Jurors 16 and 19 on the basis that they lacked ties in the community. JA II 5, 13. The prosecutor did not explain what she meant by "lacking ties in the community," and this rationale is not sufficiently clear and reasonably specific or "related to the particular case to be tried" to withstand scrutiny. *Miller-El II*, 125 S. Ct. at 2324; *Batson*, 476 U.S. at 98. Whatever it means, it is hard to see how a retired nurse with seven children and at least five grandchildren (Juror 19) can "lack ties to the community." And as far as the prosecutor knew, Juror 16 spent her entire life in the same community; the record does not show otherwise. Tellingly, the prosecutor did not strike Juror 15, a white juror who, like Juror 16, was a single, employed woman with no children, and who answered the court's questions the same way as Juror 16 did. JA 50, 113; *Miller-El II*, 125 S. Ct. at 2325 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

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[12] The State suggests that the prosecutor may have had a sincere belief that all young people – apparently regardless of their stated attitudes – are tolerant of drugs. Pet. Br. at 42. If she did have such a belief, she did not act upon it in a race-neutral way, because she admitted she had not stricken all young jurors. Obviously, an assumption that all young African-American people are tolerant of drugs would be an impermissible basis for a strike, regardless of how sincere the belief.

2. The Demeanor Justification Does Not Support the Strike

a. The Trial Court Did Not Credit the Demeanor Rationale and Did Not Deny the Motion on that Basis

In upholding the denial of the *Batson* challenge on basis of Juror 16's purported demeanor, the California Court of Appeal denied Collins's claim on a ground on which the trial court did not affirmatively rely. The state appellate court held that:

> [t]he trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt. [¶] Based on this evidence, the prosecutor's use of a peremptory challenge as to prospective juror no. 016 was proper.

PA 116. The court further explained that "[b]ecause nothing in the present record, including *the trial court's decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor*, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." PA 116-17 (emphasis added) (citation omitted).

However, the record shows that the trial judge in fact made no findings on the demeanor allegation but denied the *Batson* challenge solely on the youth rationale. The trial court stated:

> With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney; *however*, Ms. 016 was a youthful person, as was 006. And one or more prospective jurors also. [¶] The court is

> prepared to give the district attorney the benefit of the doubt as to Ms. 016.

JA II 14-15 (emphasis added).

The record thus plainly shows the trial judge's failure to observe the alleged demeanor and his willingness, *however*, to give "the district attorney the benefit of the doubt as to [Juror 16]" because she was "a youthful person," as the prosecutor had claimed. Contrary to the state appellate court's opinion, the record does not reflect that the trial court made a "decision to give the prosecutor the benefit of the doubt *as to prospective juror no. 016's demeanor*." PA 117 (emphasis added). The appellate court did not defer to a conclusion on which trial courts are entitled to great deference, as it purported to do. Rather, it denied Collins's claim on the basis of a credibility determination the trial judge never made.[13] The appellate court did not purport to make its own credibility determination on the demeanor justification, and it was in no better position to do so than the federal habeas courts.

b. The Demeanor Justification Is Not Credible, and the Prosecutor Failed To Offer Any Credible Reason To Strike Juror 16

The prosecutor's reliance on demeanor was uncorroborated, and there is no trial court finding on demeanor to which this Court can or must defer. The State's argument that federal habeas courts must defer to a state trial court's credibility determination assumes that the trial court in fact made such a determination. Here, the record

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[13] The Magistrate Judge repeated this error. *See supra* at 7-8.

shows that the trial court did not. Deference is unwarranted where, as here, the record shows the trial court never made a credibility determination at all, much less a determination resulting from the sincere and reasoned analysis that *Batson* requires.

The State suggests that a demeanor justification is so talismanic that its invocation ends the *Batson* inquiry, rendering irrelevant all other evidence of disingenuity. But *Batson* and its progeny compel a state court to treat assertions of problematic demeanor in the same way any other purported justification is treated – by examining its persuasiveness, in light of all the relevant circumstances. The Ninth Circuit conducted the examination the state courts failed to undertake, and it properly concluded that all of the relevant circumstances show that the demeanor justification is implausible and pretextual.

There is nothing in the trial court record, except the prosecutor's representation, that indicates Juror 16 answered any question by saying "uh-huh" or that she rolled her eyes and turned away from the judge. The fact that the trial judge did not see the alleged demeanor is itself suspicious in this case; because the judge was conducting the voir dire, Juror 16 would have been facing him, not the lawyers, so the judge would have been in a better position to observe Juror 16. *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) (trial court's "observations [are] particularly crucial" when prosecutor strikes jurors on demeanor grounds; "[d]etermining who is and is not attentive requires subjective judgments that are

particularly susceptible to the kind of abuse prohibited by *Batson*").[14]

The persuasiveness of the demeanor rationale is further undercut by examining the prosecutor's use of peremptory challenges as a whole. *Miller-El II*, 125 S. Ct. at 2332 ("The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light."); *Riley*, 277 F.3d at 283 ("each piece of evidence should not be reviewed in isolation"; "'a reviewing court's level of suspicion may be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts.'"). Here, as in *Miller-El II*, the prosecutor's "chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion . . . ." 125 S. Ct. at 2339.

The record shows that the prosecutor:

- Offered a patently discriminatory reason to strike Jurors 16 and 19 – gender[15] – and then abandoned it after the court informed her that this Court had forbidden peremptory challenges on that basis.[16]

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[14] This case is thus unlike those where courts uphold peremptory strikes on demeanor grounds because the trial judge corroborated assertions regarding a juror's purported demeanor. *See, e.g., Williams v. Rhoades*, 354 F.3d 1101, 1106, 1108-09 (9th Cir.), *cert. denied*, 125 S. Ct. 345 (2004); *United States v. Walton*, 217 F.3d 443, 448 (7th Cir. 2000); *Stubbs v. Gomez*, 189 F.3d 1099, 1102, 1107 (9th Cir. 1999).

[15] *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994).

[16] Crediting the prosecutor's statement that gender motivated her strikes is tantamount to finding that she purposefully discriminated in striking Juror 16; discrediting the statement is tantamount to finding that she lied to the trial court regarding her reasons for striking Juror 16.

- Stated that she sought to strike Juror 19 because she was young and lacked ties to the community, when in fact Juror 19 was a grandmother and retired nurse with seven children (at least five grown) and five grandchildren.
- Asserted that she sought to exclude Jurors 16 and 19 because they were too tolerant to sit in a drug case, when she kept at least three whites on the jury who had friends or relatives who abused drugs or alcohol and/or had related arrests.
- Claimed that she struck Juror 16 because she was single but did not strike Juror 15, a single white woman whose voir dire answers were the same as Juror 16's.[17]
- Claimed that she struck Juror 19 because her responses regarding her daughter's past drug use showed she "was not sufficiently educated in some areas to decide a case like this" and that "it is beyond any of her experience." JA II 6. This claim may have some force in a complex antitrust case, but it is an absurd rationale to offer in a simple drug possession case. Further, Juror 19 was a retired nurse, making it implausible that, compared to other jurors, she was not "sufficiently educated" or "experienced" to decide a drug case. The prosecutor failed to strike a white juror who gave similar responses.[18]

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[17] Viewed on its own terms, the "single" rationale is not reasonably "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and the prosecutor never tried to explain how it was. The record also fails to show how it would bear on Juror 16's ability to serve as a juror in the case at bar. *Walker v. Girdich*, 410 F.3d 120, 123 (2d Cir. 2005) (granting habeas relief on *Batson* claim where prosecutor struck juror because the juror "was a Black man with no kids and no family").

[18] Juror 17 stated: "I think my oldest son had a drunk driving years ago," but Juror 17 never discussed this incident with his son. JA 144.

- Lumped Jurors 16 and 19 together even though they did not have much in common besides race, gender and where they lived: Jurors 16 and 19 differed in age (youthful v. grandmother); occupation status (employed v. retired); number of children (none v. seven); and friends and relatives with drug problems (none v. a daughter). *Garrett v. Morris,* 815 F.2d 509, 514 (8th Cir. 1987).

3. Collins Has Established a *Batson* Violation

The Ninth Circuit properly held that Collins established a *Batson* violation. As shown above, one of the reasons given by the prosecutor for striking Juror 16 (gender) is illegal, and none of the other reasons – age, tolerance, lack of ties to the community, marital status or demeanor – is credible. Significantly, here, as in *Miller-El II*, the prosecutor shifted from rationale to rationale; if one was not playing well, she trotted out another. Thus, when the court advised that a gender-based strike was not "going to cut it," she shifted back to a youth rationale, and then abandoned that in favor of "lack of ties to the community." These new reasons "reek[] of afterthought" and are "difficult to credit." *Miller-El II*, 125 S. Ct. at 2328.

Jurors 16 and 19 shared few characteristics, except for race and gender. They were differently situated in terms of age, occupation, experience raising children, and experience dealing with close relatives with substance abuse problems. The prosecutor did not treat them as individuals, but instead claimed they were both disqualified from jury service because they were young, too tolerant and lacked ties to the community. That these reasons, pretextual on their own terms, were asserted against disparate black women further highlights that between the State's "explanation, and [Collins's] racial one, race is much the

better" explanation for the strike of Juror 16. *Miller-El II*, 125 S. Ct. at 2337.

Although the absolute numbers of jurors considered and peremptory strikes used were smaller than in a capital case like *Miller-El*, the statistical evidence regarding the prosecution's use of peremptories points in favor of a finding of discrimination. *Miller-El II*, 125 S. Ct. at 2325. Of the 23 prospective jurors who were considered in voir dire, three were African-American. The prosecutor used her peremptories to remove two of them, including both black women. She thus used 40% of her peremptories against African-Americans and removed 67% of the black prospective jurors. By contrast, the prosecutor struck only two of the 20 nonblacks (10%). *Miller-El II*, 125 S. Ct. at 2340 (finding discrimination where prosecutors struck 12% of nonblacks but 91% of blacks).

"[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987). Thus, it is of no moment that Collins challenges the exclusion of one juror, as opposed to several, and that one African-American served on his jury. *Holloway v. Horn*, 355 F.3d 707, 722 (3d Cir.) (granting claim where three African-Americans sat on jury); *cert. denied sub nom. Beard v. Holloway*, 125 S. Ct. 410 (2004); *Miller-El II*, 125 S. Ct. at 2325, 2330 (granting claim where one black served on jury).

C. Relief Is Proper Under 28 U.S.C. § 2254(d)(2)

The Ninth Circuit correctly concluded that the state appellate court's decision was an unreasonable determination

of the facts under (d)(2) because the prosecutor failed to offer any credible justification for striking Juror 16. JA 58.

The state appellate court decision is based on, and misconstrues, the trial judge's ruling, which in turn never firmly resolved the question whether the prosecutor purposefully discriminated in striking Juror 16. After stating that he had not seen the demeanor complained of by the prosecutor, and affirming that Juror 16 was "a youthful person," the trial judge denied Collins's *Batson* motion by stating that it was "prepared to give the district attorney the benefit of the doubt as to" her strike of Juror 16. The judge said the denial was without prejudice and warned that a future *Batson* violation would be reported to the state bar. Giving the prosecutor "the benefit of the doubt" and issuing a warning against future misconduct is not the same as finding as a matter of fact that the prosecutor did not intend to discriminate; at least, it is not a clear or firm finding.

The state appellate court gave two reasons for affirming the denial of the *Batson* motion. First, the court held that the youth justification was proper. In doing so, the court repeated the trial court's error and ignored the fact that the prosecutor had withdrawn the youth justification. Second, the court held that the demeanor justification was proper, stating that the trial judge properly gave the prosecutor the benefit of the doubt as to Juror 16's demeanor. This holding misstates the record, which shows that the judge did not see the demeanor alleged by the prosecutor and did not deny Collins's motion on the basis of demeanor. Rather, the judge gave the district attorney "the benefit of the doubt" and denied the motion on the basis of the withdrawn youth rationale. On the demeanor ground, then, the state appellate court deferred to a

credibility determination that the trial judge never made. Neither justification relied upon by the appellate court to deny the claim is supported by the record. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.) (misapprehension of record can result in unreasonable determination of facts), *cert. denied*, 125 S. Ct. 809 (2004); *Yung v. Walker*, 341 F.3d 104, 111 (2d Cir. 2003) ("the focus of § 2254(d)(2)" is "on whether the [state] court's factual findings are supported by sufficient evidence").

Even assuming the trial judge can be viewed as having accepted the demeanor rationale, the record shows by clear and convincing evidence that the rationale was not credible, and that the court should not have accepted it in light of the prosecutor's other implausible justifications. The record further shows by clear and convincing evidence that not one credible reason was given to strike Juror 16. *See supra*, Argument § I.B.; JA 58.

As the Ninth Circuit properly concluded, "[t]he fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that 'nothing in the present record indicates the trial court did not approach its task appropriately' highlights the objective unreasonableness of its assessment of the record." JA 58; *Miller-El II*, 125 S. Ct. at 2333 (finding unreasonable determination of facts where "the state court . . . had before it, and apparently ignored, testimony demonstrating that" the prosecutor's office had used a "jury shuffle" procedure to manipulate the racial composition of the jury); *Wiggins v. Smith*, 539 U.S. 510, 529 (2003) (state court's "assumption that counsel learned of a major aspect of Wiggins' background, i.e., the sexual abuse, from [social service] records was clearly erroneous" and "reflects 'an

unreasonable determination of the facts'"); *id.* at 528 (state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision"); *Simmons v. Luebbers*, 299 F.3d 929, 937 (8th Cir. 2002) (granting relief under (d)(2); "[i]t eludes us how the Missouri Supreme Court could have" reached the factual conclusion on which its denial of relief rested given that "independent review of the record" reveals that the state court's characterization of what was presented at the petitioner's first trial was "completely inaccurate"); *Alexander v. Cockrell*, 294 F.3d 626, 630-31 (5th Cir. 2002) (per curiam) (relief proper under (d)(2) because a "close review of the record persuades that the state trial court erred in reading" affidavit that formed the basis of the dispositive finding).

Collins is entitled to relief even under the interpretations of (d)(2) and (e)(1) proffered by the State. The conclusion that the prosecutor did not discriminate is not "supported by 'any substantial evidence' that would allow 'any rational trier of fact' to decide the facts as the state court did." Pet. Br. at 12.

II. THE CALIFORNIA COURT OF APPEAL'S DENIAL OF THE *BATSON* CLAIM INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The Ninth Circuit held that habeas relief was proper under § 2254(d)(1) because the California Court of Appeal's decision involved an unreasonable application of clearly established federal law. JA 35. The State does not meaningfully address this holding, much less explain why it is incorrect.

The California Court of Appeal unreasonably applied the third step of *Batson* in concluding that the trial court had fulfilled its duty to determine whether the prosecutor engaged in purposeful discrimination. The court concluded that "nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor, indicates the trial court did not approach its task appropriately . . . ." PA 116-17. In fact, as shown above, there is plenty in the record to demonstrate that the trial court did not approach its task appropriately. The trial judge did not recognize that the prosecutor had effectively withdrawn her youth justification, and he denied the *Batson* motion solely on the basis of that justification. Although the judge engaged in a partial comparative analysis of the youth rationale by comparing Juror 16 to Juror 6, he overlooked both the decisive dissimilarities between the two jurors and the fact that the prosecutor had also asserted youth as a reason to strike a grandmother (Juror 19). The judge did not recognize that the prosecutor had equated youth with tolerance and lack of ties to the community, and he failed to assess the persuasiveness of those rationales as to Juror 16, or the claim that Juror 16 was struck because she was single. The judge's ruling did not mention that the prosecutor had asserted an illegal basis for striking Jurors 16 and 19 (gender), or that many of the reasons for striking Juror 19 – youth, lack of ties to the community, lack of knowledge and experience – were facially implausible. Finally, the judge expressly noted that he had not observed the demeanor alleged by the prosecutor.

In cases involving claims of the failure to investigate and present mitigating evidence at the penalty phase of a capital trial, this Court has held that state courts unreasonably apply federal law by failing to evaluate the

totality of the available mitigating evidence, as this Court's precedents require. *Williams*, 529 U.S. at 397; *Rompilla v. Beard*, 125 S. Ct. 2456, 2467 (2005). In *Wiggins*, the Court held that a state court's "application of *Strickland*'s[19] governing legal principles was objectively unreasonable" because "the court did not conduct an assessment of whether the decision to cease all investigation . . . actually demonstrated reasonable professional judgment." 539 U.S. at 527.

Similarly, in a *Batson* case, the state court is required to "conduct an assessment" of all relevant circumstances bearing on the plausibility of the prosecutor's proffered reasons for striking a juror. The record here shows that the trial court failed to evaluate the totality of the available evidence and that the state appellate court was objectively unreasonable in concluding that the trial court had fulfilled its duty. *Walker*, 410 F.3d at 123-24 (state court unreasonably applied *Batson* where prosecutor's justification for striking black juror was not race-neutral); *Lewis*, 321 F.3d at 834-35 (state court unreasonably applied *Batson* where "the trial court did not conduct a meaningful step three analysis" and "the appellate court did not attempt to rectify the trial court's failure").

III. THE INTERPLAY OF 28 U.S.C. § 2254(d)(2) AND (e)(1)

In light of the State's claims as to the proper reading of 28 U.S.C. § 2254(d)(2) and (e)(1), Collins discusses here how and when (d)(2) and (e)(1) apply to a particular claim.

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[19] *Strickland v. Washington*, 466 U.S. 668 (1984).

In sections IV and V below, Collins addresses the flaws in the State's interpretation of the provisions.

As a general matter, sections 2254(d)(2) and (e)(1) are each concerned with state court factual findings and their effects in federal habeas corpus proceedings. That both provisions – housed in different subsections and prescribing different standards and approaches – speak to how a federal court is required to handle state court factual determinations creates a tension on the surface. On the one hand, subsection (e)(1), speaking in apparently mandatory terms, says state court factual findings "shall be presumed to be correct" absent a showing to the contrary by "clear and convincing evidence." On the other hand, subsection (d)(2) commands federal courts to assess the reasonableness of state court factual determinations "in light of the evidence presented in the State court proceeding" – that is, to look *beneath* the state court's factual *conclusions* (the same conclusions subsection (e)(1) would presume correct) to determine whether those conclusions are reasonable in light of the evidence that was before the state court.

This begs the question: How can a federal court *presume* a state court's *conclusion* to be correct ((e)(1)), while simultaneously looking *beneath* that conclusion to assess the reasonableness of the state court's work in *reaching* that conclusion to begin with ((d)(2))? As described below, the solution to this inconsistency lies not in forcing two facially incompatible (or, at best, redundant) provisions together, but in recognizing the individual roles each was designed to play in the overall scheme of habeas review. Section 2254(e) is addressed to questions that arise in the context of fact-development in federal court, and it operates to presume state court factual findings correct

unless the petitioner demonstrates the ability, both procedurally ((e)(2)) and substantively ((e)(1)), to rebut that presumption with evidence presented for the first time in federal court. Section 2254(d), by contrast, operates to limit a federal court's ability to grant habeas relief once it has found a constitutional violation, and allows such relief only where the federal court has identified a statutorily significant problem with the state court's treatment of the petitioner's claim. Within this framework, (d)(2) directs the federal court to scrutinize what the state court did *with the evidence before it*, and permits a gran of habeas relief only where the state court's erroneous denial of relief resulted from an objectively "unreasonable determination of the facts . . . ."

A. 28 U.S.C. § 2254(d)(2) and (e)(1) Are Mutually Exclusive Provisions That Do Not Apply to the Same Claim

The structure and text of § 2254(d) and (e) indicate that (d)(2) and (e)(1) are mutually exclusive provisions that do not apply to the same factual matter, but instead – as their placement in different subdivisions of § 2254 suggests – operate to address different situations and accomplish different tasks.[20]

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[20] Perhaps because of the confusion inherent in trying to apply both (d)(2) and (e)(1) to the same factual issue, the lower federal courts have said remarkably little about the relationship between these provisions during the more than nine years since AEDPA took effect. Recently, however, a handful of courts have analyzed that relationship, and although their results contain relatively minor variations, they have generally settled on approaches consistent with the argument Collins presents here. *See generally Lambert v. Blackwell*, 387 F.3d 210, 235-37 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2516 (2005); *Taylor*, 366 F.3d at

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Because federal habeas courts typically assess the state of the factual record early in the adjudicative process, we begin with § 2254(e). On its face, § 2254(e) is crafted to serve two finite and closely related purposes: limiting the circumstances under which habeas petitioners are permitted to present evidence to a federal court in the first instance; and defining the standard of proof that must be met when a petitioner is permitted to present evidence and seeks to use that evidence to challenge a factual determination made by a state court. The first of these purposes was recognized by this Court in *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000) (construing § 2254(e)(2)). The second is plain from the language of § 2254(e)(1), which provides, in relevant part, that "a determination of a factual issue made by a State court shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Read together, subdivisions (1) and (2) of § 2254(e) thus have a discrete function: to prescribe when an evidentiary hearing is permitted, what stature pre-existing state court factual findings will have at such a hearing, and what a petitioner must produce at the federal hearing in order to justify the setting aside of the state court's findings.[21]

999-1008. As described *infra*, the State can claim no such support for the *Jackson v. Virginia*-based theory it seeks to advance.

[21] The history of the habeas statute further supports this reading. In drafting AEDPA, Congress moved the presumption of correctness contained in former § 2254(d) to § 2254(e)(1), and placed it next to the newly drafted (e)(2). Under the former § 2254(d)(8), the requirement that the petitioner rebut the presumption of correctness by convincing evidence applied only when there had been "an evidentiary hearing in the proceeding in the Federal court." Although this language does not appear in (e)(1), neither does language stating that the burden of

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Where there is no federal evidentiary hearing – either because the petitioner cannot meet the demanding requirements of § 2254(e)(2) or because the factual record that emerged from the state court is complete with regard to the claim under consideration – § 2254(e) is best read as having no role to play in the federal habeas court's analysis. Although the language of (e)(1) is broad enough on its face to touch every instance of a federal court's consideration of a state court's factual determination – as evidenced by this Court's brief statements to that effect in *Wiggins* and *Miller-El II* – such a reading is neither consistent with the canon that a "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (citation omitted) (quoted in *Duncan v. Walker*, 533 U.S. 167, 174 (2001)), nor necessary to the overarching AEDPA objective of maintaining respect for state court judgments.

Section 2254(e)(1) should not and need not be read to apply beyond the scenario in which a petitioner is permitted to present new evidence in federal court for the simple reason that (d)(2), by its plain language and position in the

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rebutting the presumption by clear and convincing evidence applies in all cases regardless of whether a federal evidentiary hearing is held. It cannot be assumed that Congress intended to repudiate this history, and (e)(1)'s placement next to the evidentiary hearing standard in (e)(2) suggests that it did not. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the . . . incorporated law, at least insofar as it affects the new statute"); Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. Pub. Int. L.J. 135, 139 (1996) ("[T]he omission of the former § 2254(d)'s reference to the petitioner's burden 'in' a federal hearing is easily explained. This new provision is considerably shorter than its predecessor and may only reaffirm prior law in a more concise way.").

statutory scheme, is tailor-made, and better suited, to the task. Unlike (e)(1) – which is situated in the same subdivision as the provision governing the availability of new fact development in federal court – (d)(2) is part of AEDPA's mechanism for limiting a federal court's power to remedy a constitutional violation. (*Terry*) *Williams*, 529 U.S. at 412 (§ 2254(d) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court"); *Wiggins*, 539 U.S. at 534 ("The requirements for habeas relief established by 28 U.S.C. § 2254(d) are thus satisfied."). As such, § 2254(d)(2) is concerned not with whether evidence presented for the first time in federal court establishes a constitutional violation,[22] but with whether the state court's denial of relief on a claim the federal court has found meritorious under § 2254(a) is attributable to the state court having unreasonably determined the facts from the evidence it had before it.

That it is best to read (d)(2) as occupying the "field" where a federal habeas court adjudicates a constitutional claim using only the record that was before the state court is clear when one considers the alternative. If (e)(1) were part of the equation, then the federal court would be required to apply two different standards – one a standard

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[22] As this Court recognized in *Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (per curiam), "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer." *See Monroe v. Angelone*, 323 F.3d 286, 297-99 & n.19 (4th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003); *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001); *Rojem v. Gibson*, 245 F.3d 1130, 1140 (10th Cir. 2001).

of proof ((e)(1)'s "clear and convincing" requirement), and the other an assessment of past performance by another court ((d)(2)'s "reasonableness" requirement) – to the same factual issue. This makes no sense as a practical matter, especially in view of the fact that (e)(1) speaks to evidence that was not before the state courts, while (d)(2) is expressly restricted to evidence that was before the state courts. Moreover, the confusion and excess work brought about by using both standards yields no appreciable benefit in the form of added protection for state court decisions. After all, as this Court explained in *(Terry) Williams*, Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect" in § 2254(d), such that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision [was] . . . erroneous[] or incorrect[]. Rather, that [decision] must also be unreasonable." 529 U.S. at 411.

In light of the confusion and unnecessary doubling of analyses that would be inherent in reading both (e)(1) and (d)(2) to apply to the same factual issues, and in light of the cues to be taken from each provision's placement in different parts of the statutory scheme, they should be given "independent meaning." *(Terry) Williams*, 529 U.S. at 404. Where a petitioner is permitted to present new evidence to a federal habeas court for the purpose of challenging an existing state court factual finding, (e)(1) sets the bar the petitioner must surmount. But where the evidence before the federal habeas court is the same as the evidence that was before the state court, and the federal habeas court has concluded that a constitutional violation has been shown, habeas relief is permitted where the petitioner can further demonstrate that the state court's failure to find error is attributable to unreasonableness in

its determination of a fact material to the resolution of the claim. This approach is workable and clearly understandable, avoids the unwieldiness of applying two different inquiries to the same issue, assigns discrete but important roles to each provision, and results in no derogation of AEDPA's core purposes.

IV. THE STATE'S ARGUMENT THAT § 2254(d)(2) INCORPORATES A "REASONABLE FACT-FINDER" STANDARD SHOULD BE REJECTED BECAUSE IT IS INCONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND THIS COURT'S CASES CONSTRUING THE STATUTE

The State contends that § 2254(d)(2) incorporates the sufficiency of the evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307. Pet. Br. at 25-27. It argues that "[u]nder the (d)(2) standard, the habeas corpus court must defer to state-court findings of fact if supported by 'any substantial evidence' that would allow 'any rational trier of fact' to decide the facts as the state court did." *Id.* at 12. The State is wrong.

A. The State's Position Is Inconsistent with the Statute's Plain Language

The State never comes to terms with the fact that (d)(2) speaks in terms of "reasonableness," not "rationality." Throughout its brief, the State conflates the two terms. Pet. Br. at 27 ("[r]eview for reasonableness or rationality inquires whether any 'substantial evidence' supported the trier of fact's determination"); *id.* at 25 ((d)(2) "points to *Jackson v. Virginia*-like review for rationality or reasonableness"). As a general matter, the terms may or may not be synonymous depending on how they

are used in a particular legal rule. For example, under the "rational basis" test for equal protection claims, classifications are upheld if they are "reasonable." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). Here, however, the State seeks to apply the specific rationality test of *Jackson*, which provides "sharply limited" review of sufficiency of the evidence claims. *Wright v. West*, 505 U.S. 277, 296 (1992) (pl. op.). *Jackson*'s rationality test cannot be confused with the reasonableness standard of (d)(2).

The *Jackson* standard is based on the premise that once a defendant has been found guilty of the crime charged, the role of the factfinder (often a jury) as the weigher of all of the evidence is not to be disturbed except as necessary to guarantee due process. *Jackson*, 443 U.S. at 319. It requires reviewing courts to consider all of the evidence in the light most favorable to the prosecution. *Id.* If the record supports conflicting inferences, reviewing courts "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326. "[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957-58 (9th Cir. 2004). *Jackson* "does not require scrutiny of the reasoning process actually used by the factfinder – if known." *Jackson*, 443 U.S. at 319 n.13. This brief review of the *Jackson* standard shows both why the State would like to import it into § 2254(d)(2), and why it would be inappropriate to do so.

The plain terms of § 2254(d)(2) require federal habeas courts to examine (1) the state court's "determination of

the facts" (2) "in light of the evidence presented in the State court proceeding," and (3) then decide whether the determination was "unreasonable." Congress specifically used these terms and not the terms suggested by the State. (*Terry*) *Williams*, 529 U.S. at 411 (in analyzing the "unreasonable application" prong of § 2254(d)(1), emphasizing that "Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect'"); *Arkansas v. Farm Credit Services*, 520 U.S. 821, 827 (1997) (statutory language is to be enforced according to its terms). If Congress had intended to incorporate the *Jackson* standard – enunciated a decade and a half before AEDPA was enacted – into (d)(2), it would have used the terms of that standard. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts assume that Congress is aware of existing law when it passes legislation). But Congress did not use those terms, and this Court should decline the State's invitation to rewrite the statute to implement its proposal. *Bates v. United States*, 522 U.S. 23, 29 (1997) (courts ordinarily resist reading words into a statute that do not appear on its face).

The State's argument is also rebutted by the terms used in other parts of the statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (courts are to consider the statute in all of its parts when construing any one part). Section 2254(f) addresses challenges to "the sufficiency of the evidence." Thus, Congress was aware of insufficiency claims in enacting AEDPA; had it intended to adopt an insufficiency standard in (d)(2), it would have done so. Section 2254(d)(1), the neighboring provision in the part of the statute containing the limitations on the power to grant habeas relief, uses the same modifier as (d)(2) in requiring that an application of law be

"unreasonable" (not "irrational") in order for relief to be granted.

B. The State's Position Is Inconsistent with This Court's Cases Construing 28 U.S.C. § 2254(d)

The State's argument is also contrary to this Court's precedents interpreting and applying (d)(2). The State concedes that the *Wiggins* and *Miller-El* decisions "indicate that this Court under AEDPA has engaged in a greater level of scrutiny of state-court fact determinations than the *Jackson v. Virginia* type of rationality standard would permit." Pet. Br. at 31. The State also admits that "in the context of a discussion regarding § 2254(d)(2) and (e)(1)," *Miller-El I* "indeed stated that '[d]eference does not imply abandonment or abdication of judicial review' and that a "federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* Yet the State asserts that "neither these statements, nor the results in *Wiggins* and *Miller-El v. Dretke*, are inconsistent with the State's argument." *Id.* But the State's argument *is* inconsistent with this Court's caselaw, and the State cannot explain how it is not.

In *Lindh v. Murphy*, 521 U.S. 320, 332 (1997), this Court explained that § 2254(d) "deal[s] with, among other things, the adequacy of state factual determinations as bearing on a right to federal relief . . . ." In *Wiggins*, the Court examined the adequacy of state court factfinding, and concluded that the state decision resulted in an unreasonable determination of the facts because it was based, in part, on a "clear factual error": it assumed that defense counsel had learned from

social service records that their capital client had been sexually abused, when the records in fact did not mention any such abuse. 539 U.S. at 528.

In *Miller-El II*, the Court concluded that the state court's *Batson* decision resulted in an unreasonable determination of the facts where the state court ignored testimony of past manipulation of the racial composition of juries by the same district attorneys' office that prosecuted the habeas petitioner. 125 S. Ct. at 2333. The Court disagreed with the state court's credibility determination that the prosecutor did not discriminate, and concluded that the state court finding was unreasonable. *Compare Tibbs v. Florida*, 457 U.S. 31, 37 (1982) (*Jackson* standard does not "draw[] the appellate court into questions of credibility"). Relief was appropriate under (d)(2) even though "at some points the significance of [the habeas petitioner's] evidence" of discrimination was "open to judgment calls." *Miller-El II*, 125 S. Ct. at 2339.

Consistent with the terms of the statute and this Court's jurisprudence, the lower federal courts have held that (d)(2) requires federal habeas courts to examine the adequacy of state court factual determinations. *See, e.g., Taylor*, 366 F.3d at 999-1000 ((d)(2) requires federal habeas courts to review state court's fact-finding processes); *Lambert*, 387 F.3d at 239 ("the procedures a state court applies when adjudicating a petitioner's claims . . . may well affect whether a state court's factual determination was 'reasonable'" under (d)(2) "or whether the petitioner has adequately rebutted a presumption that the state court's determination is correct"); *compare Jackson*, 443 U.S. at 319 n.13 (under rational factfinder standard, reviewing court does not consider reasoning process actually used by trier of fact).

The State's argument is also inconsistent with this Court's interpretation of the "unreasonable application" clause of § 2254(d)(1). In *Williams*, the Court rejected the interpretation that a state court decision involves an unreasonable application of federal law "only if the state court has applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" 529 U.S. at 409. The Court ruled that an "'all reasonable jurists' standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one." *Id.* at 410. "The placement of this additional overlay on the 'unreasonable application' clause was erroneous." *Id.* at 409; *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) (cited by the State) (under *Williams*, "it is not enough that a single reasonable jurist may agree with the application" of federal law by the state court) (footnote omitted).

Despite *Williams*, the State argues that the standard under (d)(2) is "whether all reasonable decision-makers would have been compelled to agree with the habeas corpus petitioner," a standard that "equates with the habeas corpus 'any rational trier of fact' standard described in *Jackson v. Virginia* . . . ." Pet. Br. at 26-27. Elsewhere the State argues that "[i]n light of the identical use of the term 'unreasonable,' the 'unreasonable determination of the facts' standard in (d)(2) also involves the same kind of appraisal of 'unreasonableness' as is provided in (d)(1)." Pet. Br. at 26. This latter argument, coupled with the Court's interpretation of (d)(1) in *Williams*, is fatal to the State's claim.

Not only is the State's position inconsistent with this Court's caselaw, it is unsupported by any authority. The federal courts have been applying and construing AEDPA

for over nine years now, but tellingly, the State has not cited a single case in which a court has read (d)(2) as prescribing a *Jackson v. Virginia* type of review.[23]

The State's attempt to ratchet down the level of federal habeas scrutiny is particularly ill-considered in the *Batson* setting, where the courts are charged with protecting the equal protection right to jury selection free of racial discrimination; some prosecutors are taught how to discriminate and evade detection under *Batson*;[24] discriminatory intent can be difficult to prove even in the strongest of cases;[25] a violation constitutes a rare structural error requiring a new trial without a showing of prejudice; and a deferential standard of review is already built into the substantive standard of the underlying constitutional claim.

V. THE STATE'S PROPOSAL TO READ A "RATIONAL FACTFINDER" STANDARD INTO § 2254(e)(1) SHOULD ALSO BE REJECTED

The State contends that just like (d)(2), (e)(1) must be read as containing the *Jackson* standard. The State

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[23] *Jackson*'s highly deferential standard is also premised on a justification that is not present in the vast majority of habeas cases: Obtaining relief under *Jackson* signifies the rejection of the core findings of a jury and precludes a retrial.

[24] *See, e.g.*, *Wilson v. Beard*, No. 04-2461, 2005 WL 2559716 (3d Cir. Oct. 13, 2005) (discussing videotaped training session advising Philadelphia prosecutors to avoid "young black women" as jurors and instructing on "the best way to avoid any problems" under *Batson*).

[25] *Miller-El II*, 125 S. Ct. at 2340 (Breyer, J., conc.). "[T]he discriminatory use of peremptory challenges remains a problem," and "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Id.* at 2341-42.

asserts that (e)(1)'s "presumption, when attacked solely on the state record, cannot properly be said to be defeated by 'clear and convincing evidence' if the state record contains 'any substantial evidence' upon which 'any rational trier of fact' could have found the facts as the state court did under the applicable burden of proof." Pet. Br. at 30 This argument is untenable for the same reasons its (d)(1) claim fails: it is inconsistent with the statute's plain language and this Court's caselaw.

The State tries to bootstrap (e)(1) to its (d)(2) argument. It contends that if (d)(2) is read as containing the *Jackson* standard, then (e)(1) must be read the same way, too. "Applying any more instrusive standard [under (e)(1)] would risk treating § 2254(e)(1) anomalously as a relaxation rather than a tightening of the availability of the writ." Pet. Br. at 30. The State also lumps the two provisions together. *Id.* at 15 ("Separately and together, these provisions prohibit habeas corpus relief for challenges based on disputes about the facts arising solely from a state court record that rationally supported the state court's findings."). Although the State acknowledges this Court's explanation that (d)(2) and (e)(1) represent "independent requirements," *id.* at 28, it ignores this teaching.

Miller-El I explained that (d)(2) "contains the unreasonable requirement and applies to the granting of habeas relief . . . ." 537 U.S. at 341-42. By contrast, "[t]he clear and convincing evidence standard is found in § 2254(e)(1) . . . [and] pertains only to state-court determinations of factual issues, rather than decisions." *Id.* at 341. *Miller-El I* held that the provisions cannot be merged together to require habeas petitioners to prove that a factual determination is unreasonable by clear and convincing evidence. *Id.*

Regardless of the burden of proof for rebutting particular factual determinations, the requirements for granting the writ are contained in § 2254(d). Because (d)(2) and (e)(1) are independent provisions designed to serve different purposes, there is no "anomaly," as the State claims, in their containing different standards. The State's argument renders the provisions superfluous and fails to give them independent meaning. (*Terry*) *Williams*, 529 U.S. at 404 (it is "a cardinal principle of statutory construction that [courts] must 'give effect, if possible, to every clause and word of a statute' ").

The State's argument is undercut by the language used in the provision immediately succeeding (e)(1). Section 2254(e)(2)(B), drafted as part of AEDPA, precludes a federal evidentiary hearing when the petitioner "has failed to develop the factual basis of the claim in State court proceedings" unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Thus, had Congress intended to add a "factfinder" standard to the "clear and convincing" test of (e)(1), it would have done so.

The State never persuasively explains why *Wiggins* and *Miller-El* render its proposed reading of (e)(1) anything other than a dead letter. The State's response to these cases is to characterize the Court's (e)(1) (and (d)(2)) analysis in *Wiggins* as dicta, because it followed the Court's finding of (d)(1) error; to claim that *Wiggins* did not really mean what it said when it deemed a determination of fact unreasonable because it was based, in part, on a "clear factual error"; and to assert that *Miller-El* "indicates that this Court had determined that no rational fact-finder

could have rejected the inference of race discrimination in that case." Pet. Br. at 32, 33. The State cannot wipe the slate clean by ignoring (*Wiggins*) or rewriting (*Miller-El*) the Court's key cases on (d)(2) and (e)(1).

In support of its argument, the State claims that "the (e)(1) presumption of correctness is now unconditional; AEDPA entirely deleted what had been eight enumerated conditions or exceptions to the presumption's operation" that were contained in the former § 2254(d). Pet. Br. at 22; *id.* at 28. According to the State, "Congress' deletion of conditions or exceptions to the presumption . . . illuminates the direction in which Congress meant to move in § 2254(e)(1)." *Id.* at 29. The deletion may suggest a directional tilt, but it does not hint at the direction proposed by the State.

The State's argument proves too much. Among the conditions deleted are the requirements that the state court have had jurisdiction, afforded defendant due process, and actually resolved the merits of the factual dispute. Former 28 U.S.C. § 2254(d)(1), (4), (7). "Read literally," AEDPA thus "eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard to the process from which it was generated." Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.). "A regime of that kind may, of course, raise serious due process questions – at least in some cases." *Id.* (footnote omitted); *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."). This

Court has never suggested that AEDPA so radically altered the pre-existing habeas regime.

Wiggins and *Miller-El II* demonstrate that this Court has declined to read (e)(1) or (d)(2) to require federal habeas courts to rubber-stamp state court findings of fact regardless of how they were made or whether they are supported by the record. *See also Taylor*, 366 F.3d at 999-1000; *Lambert*, 387 F.3d at 238-39; Yackle, *Federal Hearings Under the New Habeas Corpus Statute*, 6 B.U. Pub. Int. L. J. at 141 ((e)(1) does not "dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record"; (e)(1) "departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards").

The State argues that "[t]he burden now always devolves upon the prisoner to rebut the presumption not just with 'convincing' evidence as in former § 2254(d) but with 'clear and convincing evidence.' This is an extremely heavy burden." Pet. Br. at 28. So does the State contend that there was formerly a category of "unclear but convincing evidence" that would have rebutted the presumption? "Convincing" is, and was, the key term, and the addition of the word "clear" does not increase the petitioner's burden. Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.).

The State's fallback argument is that under (e)(1), the "clear error" standard should apply, as it does on appeal of factfindings under *Batson*. Pet. Br. at 35. Collins agrees that this is a reasonable construction of the statute. It is the language used in *Wiggins* and *Miller-El II*, and in Fed.

R. Civ. P. 52(a) for reviewing findings of fact by district courts. It is a deferential standard – allowing reversal only when the reviewing court is left with a "definite and firm conviction that a mistake has been committed" – and one federal courts are used to applying.

The State's *Jackson* proposal, by contrast, would allow relief only when the state court acted "irrationally." As the State concedes, it would be a rare case when one could say that the trial judge acted irrationally in finding facts. But judges do make serious, material mistakes of fact short of acting irrationally. Subsection (e)(1) is designed to allow habeas petitioners to overcome defective findings of fact by clear and convincing evidence, a "demanding but not insatiable" standard. *Miller-El II*, 125 S. Ct. at 2325.

CONCLUSION

For all of the above reasons, this Court should affirm the judgment of the Ninth Circuit.

Dated: October 19, 2005

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

No. 04-52

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, Warden, et al., *Petitioners,*

v.

STEVEN MARTELL COLLINS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JULY 7, 2004
WRIT OF CERTIORARI GRANTED JUNE 28, 2005

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit, filed November 7, 2003 ..... B 48-89

Order of the United States Court of Appeals for the Ninth Circuit, filed April 29, 2003 ..... C 90

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Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, filed December 12, 1997 ..... H 109-20

U.S. District Court

CENTRAL DISTRICT OF CALIFORNIA
(Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:98-cv-09329-TJH-AN

Steven M. Collins v. Daniel Lungren, et al
Assigned to: Judge Terry J. Hatter
Referred to: Magistrate Judge Arthur Nakazato
Demand: $0
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 11/19/1998
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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DOCKET PROCEEDINGS

Date Filed	#	Docket Text
11/19/1998	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Steven Martell Collins in State Custody referred to Magistrate Judge Arthur Nakazato. (jp) (Entered: 11/23/1998)
11/19/1998	2	NOTICE and ORDER of Reference to Magistrate Judge Arthur Nakazato (jp) (Entered: 11/23/1998)
12/03/1998	3	ORDER by Magistrate Judge Arthur Nakazato dismissing the habeas corpus petition [1-1] Petnr hv to 1/4/99 to fi amd petn, petnr s/subm either a properly completed req ifp or the $5 filing fee (dmjr) (Entered: 12/11/1998)
12/23/1998	4	REQUEST by petitioner for ext of ti to fi amd petn. Lodged ord (dmjr) (Entered: 12/29/1998)
01/11/1999	5	AMENDED PETITION FOR WRIT OF HABEAS CORPUS (pbap) (Entered: 01/22/1999)
01/11/1999	6	REQUEST by petitioner Steven Martell Collins to file amd ptn for writ of H/C beyond the crt imposed ddl. (ab) (Entered: 01/25/1999)
01/11/1999		LODGED AMD PTN submitted by respondent Daniel Lungren (FWD TO CRD) (ab) (Entered: 01/25/1999)

01/13/1999 7 MINUTES: denying request for ext of time [6-1] as moot, granting request to file first amd ptn [4-1]; the req to proceed in forma pauperis is GR by Magistrate Judge Arthur Nakazato CR: none (ab) (Entered: 01/25/1999)

01/15/1999 8 ORDER by Magistrate Judge Arthur Nakazato dismissing the habeas corpus petition [5-1] w/out prej and w/lv to amd; if petr wishes to proceed with this matter, he shall have until 2-12-99, to file a second amd ptn tht fully complies with the M&O and this memo and ord. (ab) (Entered: 02/04/1999)

01/29/1999 9 SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS; adding defendant Bertram Rice, Warden (pbap) (Entered: 02/05/1999)

02/05/1999 10 ORDER by Magistrate Judge Arthur Nakazato tht the clk of the crt shall forward cpys of the ptn to respdent and his or her resp and the Atty General of the State of CA; ord tht respdent shall fiel and srv a rtn to the ptn on or bf 4-6-99; fur ord tht respdent shall make a careful exam of the question of exhaustion of state crt remedies. (ab) (Entered: 02/16/1999)

02/24/1999 12 REQUEST by petitioner Steven Martell Collins to expand the record in this h/c prcdng (pbap) (Entered: 03/08/1999)

02/26/1999 11 MINUTES: Ptnr's "Req to Expand the Record in this H/C Prcdngs,' fld 2/25/99 (the Req). Rspdnt shl fi and srv an opp or stmt of non-opp to the Req on or before 3/17/99. Ptnr shl fi and srv any rply on or before 3/31/99. The Req will be tkn under subm as of 3/31/99, and no appr will be necessary by Magistrate Judge

Arthur Nakazato CR: none (pbap) (Entered: 03/03/1999)

03/03/1999 13 NOTICE OF CHANGE Of Address filed by petitioner Steven M. Collins (pbap) (Entered: 03/15/1999)

03/08/1999 14 MINUTES: The Crt is in rcpt of Ptnr's Ntc of Chg of addr ("Ntc"). The Crt notes tht the ptnr's correct addr is as follows (herein) by Magistrate Judge Arthur Nakazato CR: none (pbap) (Entered: 03/15/1999)

03/17/1999 15 STATEMENT of non-opp by respondent to [12-1] (pbap) (Entered: 03/22/1999)

03/23/1999 16 MINUTES: granting request [12-1] by Magistrate Judge Arthur Nakazato CR: none (pbap) (Entered: 03/26/1999)

04/06/1999 17 MOTION by respondent to dismiss 1nd amd petn for W/H/C (pbap) (Entered: 04/09/1999)

05/06/1999 18 OPPOSITION by petitioner Steven Martell Collins to dism second amd ptn for writ of H/C; memo of PA. (ab) (Entered: 05/12/1999)

05/11/1999 19 MINUTES: on 1-29-99, petr fld the pending second amd ptn for writ of H/C raising three grnds for federal habeas relief; respdents fld a mot ot dism the second amd ptn contending tht petr third clm is not exhausted because he failed to assert the federal legal theory upon which his clm is based in his ptn for review to the CA Supreme Crt; petr failed to file an opp to the mot; option 1; req this crt to ent a jgm only on his first and second clms for reilf; option 2 req this crt to dism the pending second amd ptn w/out prej to petr filing a new ptn

once available stat remedies are exhausted; petr shall file and srv on respdents a resp to this ord setting forth his election of either option 1 or option 2 NLT 6-10-99; if petr fails to timely file a resp to this ord, the entire actn will be subject to dismissal w/prej for failure to comply with this crt ord by Magistrate Judge Arthur Nakazato CR: none (ab) (Entered: 05/20/1999)

06/09/1999 20 RESPONSE by petitioner Steven Martell Collins re minutes [19-1] (pbap) (Entered: 06/14/1999)

06/14/1999 21 MINUTES: In the response, petitioner elects to proceed with Option 1 of the crts 5/11/99 minute order. Accordingly, the crt will enter jgm only on petitioners first and second claims for relief, and the unexhausted third claim is deemend stricken from the petition. Respondent shall have until 8/13/99 to serve and file a return addressing the merits of Claims 1 and 2. Petitioner shall have until 9/13/99 to serve and file a traverse addressing matters raised in the return. The ptys papers shall otherwise comply with the crts precious order re further proceedings...filed 2/5/99. by Magistrate Judge Arthur Nakazato CR: N/A (shb) (Entered: 06/16/1999)

07/23/1999 22 NOTICE OF MOTION AND MOTION by petitioner Steven Martell Collins for status report (shb) (Entered: 07/29/1999)

08/06/1999 23 APPLICATION for enlargement of ti to fi the rtn by respondent (pbap) (Entered: 08/10/1999)

08/06/1999 LODGED/PROPOSED ORDER submitted. (FWD TO CRD) (pbap) (Entered: 08/10/1999)

08/09/1999 24 ORDER by Magistrate Judge Arthur Nakazato tht Rspdt is grntd to and includ 9/12/99 to fi a Rtrn. Ptrnis grntd to and includ 10/12/99 to fi and srv a Trav. (pbap) (Entered: 08/16/1999)

08/10/1999 25 MINUTES: granting in part motion for status report [22-1]. On or bef 8/27/99, rspdnt shl fi and srv a stat rpt by Magistrate Judge Arthur Nakazato CR: none (pbap) (Entered: 08/16/1999)

08/27/1999 26 NOTICE by respondent Bert Rice, respondent Daniel Lungren of interested ptys. (ab) (Entered: 09/01/1999)

08/27/1999 27 STATUS REPORT by respondent Bert Rice, respondent Daniel Lungren; exhs. (ab) (Entered: 09/01/1999)

09/13/1999 28 RETURN TO PETITION for Writ of H/C by respondent Bert Rice, respondent Daniel Lungren [9-1] (pbap) (Entered: 09/14/1999)

09/13/1999 29 APPLICATION by respondent Bert Rice for filing under seal and protective order (shb) (Entered: 09/16/1999)

09/13/1999 LODGED/PROPOSED ORDER & 2 confidential reports submitted by respondent Bert Rice for application [29-1]. (FWD TO CRD) (shb) (Entered: 09/16/1999)

09/13/1999 30 NOTICE by respondent Bert Rice of lodging documents (shb) (Entered: 09/16/1999)

09/13/1999 LODGED 1 envelope submitted by respondent Bert Rice (FWD TO CRD) (shb) (Entered: 09/16/1999)

09/16/1999 31 ORDER by Magistrate Judge Arthur Nakazato granting application [29-1]. Ptnr's confidential probation rpt and the sealed Rptr's Transc are hereby filed under seal and are not to be disclosed to persons other than those involved in the pending appl for W/H/C. (pbap) (Entered: 09/27/1999)

09/16/1999 32 Confidential Probation Officer's Rtp filed by respondent ***UNDER SEAL*** (pbap) (Entered: 09/27/1999)

09/17/1999 33 SEALED REPORTER'S TRANSCRIPT filed by respondent ***UNDER SEAL*** (pbap) (Entered: 09/27/1999)

09/29/1999 34 OBJECTIONS by petitioner Steven Martell Collins to [29-1] (pbap) (Entered: 10/01/1999)

09/29/1999 39 REQUEST by petitioner Steven Martell Collins for ext of ti to fi trav (pbap) (Entered: 10/19/1999)

09/29/1999 LODGED/PROPOSED ORDER submitted. (FWD TO CRD) (pbap) (Entered: 10/19/1999)

10/01/1999 35 MINUTES: (In Chambers) by Magistrate Judge Arthur Nakazato: In the Opposition, pet seeks: 1) an ord unsealing pages 66-72 of the Rptr's Transcript (the Sealed Transcript); 2) copies of the Sealed Transcript; and 3) an ord sealing his confidential probation rpt. Pet's FIRST req for an ord unsealing the Sealed Transcript is DENIED. The Crt already ord pet's confidential prob rpt fld under SEAL, so pet's 3rd req is MOOT. Accordingly, on or bef 10/15/99, resp shall file & srv either an opp or a statmnt of non-opp. If resp opp pet's req for a copy of the Sealed Transcript, pet may, on or bef 10/25/99, file & srv a rply. IT IS SO ORD;

CR: n/a (cc: cnsl) (lb) Modified on 10/05/1999 (Entered: 10/05/1999)

10/01/1999 36 ORDER by Magistrate Judge Arthur Nakazato: IT IS ORDERED that Pet is GRANTED to & incl 11/12/99 to file a Traverse to the Pet for H/C. (lb) (Entered: 10/12/1999)

10/08/1999 37 MINUTES: RE: Ptnr's Req for Ext of ti to fi trav fld on 9/29/99. In light of the Crt's 10/1/99 Min Ord, Ptnr Req is GRANTED by Magistrate Judge Arthur Nakazato CR: none (pbap) (Entered: 10/13/1999)

10/15/1999 38 STATEMENT of non-opp to ptnr's req for a copy of sealed transcript by respondent (pbap) (Entered: 10/18/1999)

12/20/1999 40 MOTION by petitioner Steven Martell Collins for status rpt (pbap) (Entered: 12/22/1999)

01/10/2000 41 MINUTES: granting motion for status rpt [40-1] petnr req for copy of sealed trnscrpt is granted, parties are to make no copies of sealed trnscrpt & are to disclose it only to those involved in petn h/c by Magistrate Judge Arthur Nakazato CR: n/a (dmjr) (Entered: 01/12/2000)

02/24/2000 42 TRAVERSE by petitioner Steven Martell Collins to [28-1] (pbap) (Entered: 02/28/2000)

06/15/2000 43 REQUEST (motion) by petitioner Steven Martell Collins for status rpt (pbap) (Entered: 06/21/2000)

06/20/2000 44 MINUTES: (in chambs) Ord granting petnr's request for status rpt fld on 6-15-00 [43-1] by Magistrate Judge Arthur Nakazato CR: none (krpa) (Entered: 06/22/2000)

09/01/2000 45 MOTION by petitioner Steven Martell Collins for osc (pbap) (Entered: 09/07/2000)

09/12/2000 46 MINUTES: (In Chambers) denying petr's motion for osc [45-1] by Magistrate Judge Arthur Nakazato CR: none (kh) (Entered: 09/13/2000)

02/28/2001 47 MOTION by petitioner Steven Martell Collins for decision of petr's writ pet clms (rmi) (Entered: 03/02/2001)

03/12/2001 48 MINUTES (In Chambers): granting petr's motion for decision of petr's writ pet clms [47-1]; the crt anticipates filing a R & R in this matter by the end of 2001; the crt has an extremely heavy caseload & appreciates the ptys' patience; by Magistrate Judge Arthur Nakazato CR: none (rmi) (Entered: 03/15/2001)

07/12/2001 50 REPORT AND RECOMMENDATION issd by US Magistrate Judge Arthur Nakazato (cc: all cnsl) (dw) (Entered: 07/17/2001)

07/13/2001 49 NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Arthur Nakazato and Lodging of Proposed Judgment and Order (cc: all cnsl) (dw) (Entered: 07/17/2001)

08/06/2001 51 OBJECTION by petitioner to Mag Judge's Report and Recommendation [50-1] (dw) (Entered: 08/08/2001)

08/31/2001 52 ORDER by Judge Terry J. Hatter approving and adopting report and recommendation of US Mag Judge [50-1] (SEND) (mt) (Entered: 08/31/2001)

08/31/2001 53 JUDGMENT AND ORDER by Judge Terry J. Hatter: It is h/b adjudged that this actn is dism w/prej for the reasons set forth in the related Mag Judge's report & recommendation; terminating case (MD JS-6) (ENT 8/31/01) (SEND/NTC) (mt) (Entered: 08/31/2001)

10/01/2001 54 NOTICE OF APPEAL by petitioner Steven Martell Collins to 9th C/A from Dist. Court jgm & ord fld 8/31/01 & ent 8/31/01 [53-2] (cc: Steven Martell Collins, St/Atty Gen) COA Pending (app) (Entered: 10/05/2001)

10/01/2001 55 APPLICATION for CERTIFICATE of APPEALABILITY by petitioner Steven Martell Collins (FWD TO CRD) (app) (Entered: 10/05/2001)

10/23/2001 56 ORDER by Judge Terry J. Hatter re: The certificate of appealability is GR. The specific issues satisfy 2253(c)(2) as follows: Whether the petr's rights were violated under Batson v. Kentucky, 476 U.S. 79 (1986), where the prosecutor exercised a peremptory challenge against an African American juror, ostensibly on the grounds of the juror's age & demeanor. [55-1] (cc: all prtys) (ghap) (Entered: 10/30/2001)

11/05/2001 57 CERTIFICATE of Record Transmitted to USCA (cc: all parties) (dlu) (Entered: 11/05/2001)

11/16/2001 58 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [54-1] 01-56958 (weap) (Entered: 11/16/2001)

12/21/2001 59 MOTION by petitioner Steven Martell Collins for leave to appeal in forma pauperis (fvap) (Entered: 05/30/2002)

01/15/2002 60 CLERK'S record on appeal transmitted to Circuit (01-56958) [54-1] vols: 3 (not included doc #44) (weap) (Entered: 01/15/2002)

01/15/2002 61 CLERK'S record on appeal transmitted to Circuit Orig sealed docs #32 & 33. (01-56958) [54-1] (weap) (Entered: 01/15/2002)

01/18/2002 62 ORDER by Judge Terry J. Hatter granting motion for leave to appeal in forma pauperis [59-1] (fvap) (Entered: 05/30/2002)

03/22/2002 63 RECORD on appeal returned from U.S. Court of Appeals re appeal [54-1] vols: 3 & 2 envelopes of underseal doc's. (ghap) (Entered: 03/26/2002)

03/28/2002 64 CC ORDER FROM USCA clk shall svc a copy of this ord by fax on Maria E. Stratton, DFPD, who will locate appt cnsl. The dist crt shall provide this crt with the name & address of appt cnsl by fax w/in 14 days of locating cnsl. 01-56958 (ghap) (Entered: 04/05/2002)

06/03/2002 65 EX PARTE APPLICATION filed by petitioner for an ord to release under seal docs fld in this case to Karyn H. Bucur petr's appointed appellate cnsl; Decl of Karyn H Bucur; Lodged ord (dw) (Entered: 06/05/2002)

06/17/2002 66 ORDER by Magistrate Judge Arthur Nakazato granting ex parte application for an ord to release under seal docs fld in this case to Karyn H. Bucur petr's appointed appellate cnsl [65-1]; (see doc for specifics) (rmi) (Entered: 06/18/2002)

04/28/2003 67 CLERK'S record on appeal transmitted to Circuit (01-56958) [54-1] vols: 3 (Not included document #44) (weap) (Entered: 04/28/2003)

04/28/2003 68 CLERK'S record on appeal transmitted to Circuit original sealed documents (2) numbers 32 & 33 [54-1]. (01-56958) (weap) (Entered: 04/28/2003)

09/17/2003 69 RECORD on appeal returned from U.S. Court of Appeals re appeal [54-1] vols: 1-3; 2 sealed documents. (ghap) (Entered: 09/22/2003)

Docket as of July 8, 2005 11:15 p.m.

GENERAL DOCKET

US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 01-56958 Filed: 11/14/01
Nsuit: 3530 Habeas corpus (Fed)
Collins v. Rice, et al
Appeal from: Central District of California, Los Angeles

- -

Case type information:
1) prisoner petition
2) state
3) habeas corpus

- -

Lower court information:

District: 0973-2 : CV-98-09329-TJH
presiding judge: Terry J. Hatter, Jr., Chief District Judge
court reporter: Dawn Bullock, Court Reporter
Date Filed: 11/19/98
Date order/judgment: 8/31/01
Date NOA filed: 10/1/01
Date of cert pc: 10/23/01

- -

Fee status: in forma pauperis

- -

Prior cases:
None
Current cases:
None

STEVEN MARTELL COLLINS Petitioner - Appellant	Steven Martell Collins # J-00781 [COR LD NTC prs] CSPI - CALIFORNIA STATE PRISON IRONWOOD (BLYTHE) P.O. Box 2199 Blythe, CA 92226-2199 Karyn H. Bucur, Esq. FAX 949/470-1244 949/472-1092 Room #E193 [COR LD NTC cja] KARYN H. BUCUR Attorney at Law 24881 Alicia Parkway Laguna Hills, CA 92653
v.	
BERTRAM RICE Respondent - Appellee	Erika Denice Jackson, Esq. FAX 213/897-2808 213/897-6973 Suite 5000 [COR LD NTC dag] AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (LA) 300 S. Spring St. Los Angeles, CA 90013
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Respondent - Appellee	Erika Denice Jackson, Esq. (See above) [COR LD NTC dag]

STEVEN MARTELL COLLINS

Petitioner - Appellant

v.

BERTRAM RICE; ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

Respondents - Appellees

11/14/01 DOCKETED CASE-ENTERED INCAR-PROSE-APLT. NO CADS. Setting schedule as follows: appellant's opening brief is due 12/24/01; appellees' brief is due 1/23/02,; appellants' reply brief is due 2/6/02; [01-56958] (rmw)

11/14/01 Filed certificate of record on appeal RT filed in DC N/T [01-56958] (rmw)

12/6/01 Filed order (Deputy Clerk: jw) A review of the DC docket reflects that aplt has not paid the filing fees for this appeal. Within 21 days of this order, aplt shall 1, file a motion with this court to proceed ifp; 2, pay the fees or 3, otherwise show cause why the appeal should not be dismissed for failure to prosecute. If aplt fails to comply eith this order, the appeal will be dismissed by the clerk. [01-56958] (wp)

1/3/02 Filed original and 7 copies Appellant Steven Martell Collins opening brief (Informal: no) 29 pages served on 12/21/01 [01-56958] (wp)

1/3/02 Filed Appellant Steven Martell Collins's motion for broader certification of appealability. (MOATT) [01-56958] served on 12/21/01 [4331463] [01-56958] (wp)

1/4/02 Requested District Court casefile. Tina (mu)

1/17/02 Received District Court case file. 3 clerk's records & 2 sealed envelopes.(original) Sent to Tina Price. (sd)

1/18/02 Filed Bertram Rice motion to extend time to file appellee's brief. (MOATT) [01-56958] served on 1/14/02 [4344755] (wp)

1/31/02 Received notification from District Court re payment of docket fee. Motion to proceed in forma pauperis granted. (Date: 1/18/02) (case file) [01-56958] (lu)

2/20/02 Filed Bertram Rice motion to extend time to file appellee's brief. (MOATT) [01-56958] served on 2/14/02 [4372060] (wp)

3/1/02 Filed Appellant Steven Martell Collins's receipt of motion to proceed in forma pauperis. (MOATT) [01-56958] served on 2/26/02 [4374827] [01-56958] (wp)

3/15/02 District court casefile returned. 3 clerk's records & 2 sealed envelopes. ups (sd)

3/25/02 Filed order (William A. FLETCHER, Raymond C. FISHER,): Appellant's motion for boader certification pursuant to 9th Cir. R. 22-1(d) is granted with respect to following issue: whether aplt's Three Strike sentence constitues cruel and unusual punishment as prohibited by the 8th Amendment. The court sua sponte appoints counsel who will be appointed by separate order. The clerk shall serve a copy of this order by fax on Maria E. Stratton, who will locate appointed counsel. The DC shall provide this court with the name and address of appointed counsel by fax within 14 days of locating counsel. The court has rcvd notifcation that the DC has granted ifp status. Accordingly the 12/6/01 order to show cause is discharged. The clerk shall change the docket to reflect aplt's ifp status for this appeal. The

brieifng The briefing schedule as follows: appellant's brief is due 5/20/02; appellees' brief is due 6/24/02, and the reply brief is due 14 days from the service of the answering brief. Respondent's motion for an extension of time are denied as moot. [01-56958] (wp)

5/31/02 Received copy of District Court order filed on May 20, 2002 appointing Karyn H. Bucur, Esq. counsel of record. [01-56958] (dl)

5/31/02 Filed order (Deputy Clerk: dl) Due to the delay in the appointment of counsel, the court sua sponte, resets the briefing schedule. Appellant's opening brief and excerpts of record are due July 1, 2002; appellee's answering brief is due July 31, 2002; the optional reply brief is due within 14 days from service of the answering brief. [01-56958] (dl)

6/3/02 Received Karyn H. Bucur for Appellant Steven Martell Collins letter dated 5/30/02 re: The reason for this letter to the court is to inform the court of a delay in receiving the DC file. (MOATT) [01-56958] (wp)

6/26/02 Filed motion and deputy clerk order: (Deputy Clerk: cag) Appellant's request to reset the briefing schd is granted. The appellants' opening brief due 7/29/02. The appellees' brief due 8/28/02 and the reply brief is due 14 days from the service of the answering brief. (Motion recvd 6/24/02) [01-56958] (wp)

7/25/02 14 day oral extension by phone of time to file Appellant brief. [01-56958] appellants' brief due 8/12/02; appellees' brief due 9/11/02, ; optional reply brief due 14 days from service of answering brief (cb)

8/2/02 Filed motion and deputy clerk order: (Deputy Clerk: tah) The court is recipt of the appellee's motion to stay appellate proceedings pending the USSC's resolution of Lockyer v. Andrade 270 F.3d 743 (9th Cir. 2001) No 01-1127 (cert. granted 4/1/02) and Ewing v. California No. 01-6978, 2002 WL 480176 (U.S. Apr 1, 2002). The motion represents that the request for a stay of proceedings is denied. The current briefing schd remains in place. The appellees are reminded that they may file a future motion for leave to file a supplemental brief regarding the resolution of the cases noted above. denying motion & order staying further action [4496375-1] (Motion recvd 7/29/02) [01-56958] (wp)

8/8/02 Filed original and 15 copies Appellant Steven Martell Collins opening brief (Informal: no) 62 pages and five excerpts of record filed under seal served on 8/6/02 [01-56958] (wp)

9/9/02 Filed motion and deputy clerk order: (Deputy Clerk: tah) The appellee's motion for an extension of time in which to file the answering brief is granted. The answering brief is due 10/11/02. The reply brief is due 14 days from service of the answering brief. (Motion recvd 9/4/02) [01-56958] (wp)

10/15/02 Filed original and 15 copies appellee Attorney General CA's 42 pages brief, 5 supplemental Excerpts under seal. served on 10/11/02 [01-56958] (wp)

10/21/02 Filed motion and deputy clerk order: (Deputy Clerk: tah) The appellee's motion to file the supplemental excerpts of record under seal is granted. The Clerk has filed the supplemental excerpts under seal pursuant to appellee's 9th Cir. Rule 27-13 notice. (Motion recvd 10/15/02) [01-56958] (wp)

12/6/02 Filed order (STAFF ATTY/Deputy Clerk: JN) Proceedings in this case shall be held in abeyance pending the USSC's resolution of Andrade v. Attorney General of Cal., 270F.3d 743 (9th Cir. 2001), cert granted, 122 Ct. 1434 (2002). Within 30 days of the USSC's final decision in Andrade, appellee shall file in this appeal a motion for appropriate relief. [01-56958] (wp)

3/31/03 Calendar materials being prepared. [01-56958] [01-56958] (aw)

4/4/03 CALENDARED: PASA Jun 5 2003 900 am Courtroom 2 [01-56958] (aw)

4/22/03 Filed Bertram Rice motion to withdraw certification (PANEL) [01-56958] served on 4/18/03 [4716514] (wp)

4/24/03 Filed Appellant Steven Martell Collins opposition to appellee's motion to withdraw certification. (MOATT) [4716514-1] served on 4/22/03 [01-56958] (wp)

5/30/03 Filed Steven Martell Collins additional citations, served on 5/30/03. (PANEL) (CASE FILE) [01-56958] (rmw)

6/5/03 ARGUED AND SUBMITTED TO Cynthia H. HALL, Sidney R. THOMAS, Richard A. PAEZ [01-56958] (rmw)

11/7/03 FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Cynthia H. HALL, dissenting; Sidney R. THOMAS; Richard A. PAEZ, author.) FILED AND ENTERED JUDGMENT. [01-56958] (wp)

11/21/03 [4903003] Filed original and 50 copies Appellee Bertram Rice petition for panel rehearing and petition for rehearing en banc (PANEL AND ALL ACTIVE JUDGES) 11 p.pages, served on 11/20/03 [01-6958] (wp)

12/12/03 Filed order (Richard A. PAEZ,): Appellant is directed to file a response, not to exceed 15 pages, to appellee's petition for rehearing and petition for rehearing en banc filed with this court on 11/21/03. 50 copies of the response shall be filed with the Clerk of Court within 21 days from the date of this order. [01-56958] (wp)

12/31/03 Filed Appellant Steven Martell Collins's response to appellee's petition for rehearing [4903003-1] served on 12/29/03 (PANEL AND ALL ACTIVE JUDGES) [01-56958] (wp)

4/8/04 Filed order and amended opinion (Judges Cynthia H. HALL, Sidney R. THOMAS, Richard A. PAEZ,) (Orig. opinion id: [4889572-1]) The petition for rehearing en banc is denied. See opinion for complete amendments. [01-56958] (ft)

4/12/04 Filed Attorney General CA motion to stay the mandate. (PANEL) [01-56958] [01-56958] served on 4/9/04 [5036029] (wp)

4/29/04 Filed order (Richard A. PAEZ,): Respondent's motion for stay of the mandate is granted. The mandate shall be stayed for 90 days. [5036029-1] [01-56958] (wp)

7/9/04 Rcvd copy of petition for writ of cert. [01-56958] (wp)

7/19/04 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 04-52 filed on 7/13/04. [01-56958] (ca)

7/23/04 Filed aples' Rice mtn for stay of mandate; served on 7/22/04. (PANEL) [01-56958] [5128606] (ea)

7/29/04 Filed order (Richard A. PAEZ,): Respondent's motion for stay of the mandate is granted. The mandate shall be stayed until the USSC's final disposition of respondent's petition for writ of cert. (MOATT) [5128606-1] [01-56958] (wp)

7/5/05 Received notice from Supreme Court, petition for certiorari GRANTED on 6/28/05. Supreme Court No. 04-52 (PANEL & MOATT) (ru)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN MARTELL COLLINS, *Petitioner-Appellant*, v. BERTRAM RICE; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Respondents-Appellees.*	No. 01-56958 D.C. No. CV-98-09329-TJH ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted
June 5, 2003—Pasadena, California

Filed November 7, 2003
Amended April 8, 2004

Before: Cynthia Holcomb Hall, Sidney R. Thomas, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Hall

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that substantial evidence can support a drug offender's contention that the prosecutor dismissed an African American juror because of her race, where the prosecutor's justifications for dismissing the juror on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in the case (lack of community ties), and were not applied equally to white jurors (single with no children); and where one of the prosecutor's justifications was patently discriminatory (gender), while one of her justifications for dismissing another African American was contrary to the record (age).

Appellant Steven Collins petitioned for a writ of habeas corpus in district court under 28 U.S.C. § 2254, alleging that race motivated the prosecutor's peremptory strikes against two African-American women, Juror 016 and Juror 019, a middle-aged grandmother, during jury selection prior to his California state court trial for possession of a controlled substance. The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be too tolerant for this type of case, (2) her demeanor, (3) her marital status—single with no ties, (4) her lack of ties to the community, and (5) her gender. The prosecutor did not strike a white juror who possessed the same objective characteristics as Juror 016. The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The prosecutor also struck Juror 019, noting her youth and daughter's former drug problem. The jury found

Collins guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of 25 years to life in state prison.

The California Court of Appeal affirmed Collins' conviction and sentence, concluding that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral. The California Court of Appeal determined that because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective Juror 016 based solely on her age. However, noting that nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective Juror 016's demeanor, indicated that the trial court did not approach its task appropriately, the appellate court determined that the trial court's decision was entitled to deference. The California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus. The district court denied Collins' federal habeas petition.

Collins appealed.

[1] The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. [2] Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation. [3] Youthful age and demeanor are not characteristics peculiar to a given race or group-based presuppositions applicable in all criminal trials to African-American jurors. [4] Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 was not contrary to, or an unreasonable application of, clearly established law.

[5] Although age has been upheld as a proper basis for excusing a potential juror, the prosecutor attempted to equate Juror 016's youthful age with a possible bias favoring criminal defendants facing drug charges. [6] According to the Supreme Court, Juror 016's age had to be related to the particular case to be tried. Instead, the prosecutor's reason for excluding Juror 016 related to the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community. [7] Not only was the prosecutor's statement that Juror 016 had a lack of ties in the community not sufficiently clear and reasonably specific, but it was also not supported by the record and did not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. [8] There was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age.

[9]There was substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race—evidence that the appellate court failed to address. The trial record demonstrated that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also showed that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrated that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

[10] Collins thus showed by clear and convincing evidence that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. [11] Contrary to the appellate court's assessment of the record, the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016. The appellate court's contrary determination demonstrated that it unreasonably concluded that the trial court had fulfilled its duty to determine whether Collins had shown purposeful discrimination. [12] It had to be concluded that the state trial appellate court committed constitutional error that warranted the grant of a writ of habeas corpus under § 2254. The judgment of the district court had to be reversed.

Judge Hall dissented, writing that both the majority opinion and the record were devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with no permissible alternative but to reject the prosecutor's race-neutral justifications.

COUNSEL

Karen H. Bucur, Laguna Hills, California, argued the case for the appellant.

Erika D. Jackson, Deputy Attorney General, Los Angeles, California, argued the case for the appellees.

ORDER

The opinion filed November 7, 2003 is AMENDED as follows:

1. Page 15915, line 14: delete "and 019" and change "Jurors" to "Juror."

2. Footnote 12, line 2: after "challenge" insert "because the prosecutor labeled Juror 019 'young' even though Juror 019 was a grandmother."

3. Delete the first full paragraph on page 15917.

4. Delete "her pretextual justifications for dismissing Juror 019," on line 2-3 of the last paragraph on page 15917.

5. The first full sentence on page 15919 should be amended to read: "The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age)."

6. Footnote 15, lines 16-17: change "three reasons were not applied to comparably similar jurors who were not struck" to "one reason was not applied to a comparably similar juror who was not struck."

7. Delete the following from page 15922: ", while her justification based on Juror 019's daughter's past cocaine addiction was pretextual given that a white juror (Juror 030) with comparably similar characteristics was permitted to serve on the jury."

8. Page 15922, line 19: change "Jurors" to "Juror" and delete "and 019".

With these amendments, the panel majority has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Hall voted to grant the petition for panel rehearing, and recommended granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied.

BEA, Circuit Judge, with whom KLEINFELD, GOULD, TALLMAN, and CALLAHAN, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's denial of the state's petition for a rehearing en banc because the majority opinion seriously undermines the ability of a trial court to judge the sincerity of counsel's reason for a peremptory challenge to a juror when a *Batson/Wheeler*[1] challenge is made.

Collins is an African American who was convicted of possession of 0.1grams of rock cocaine. It was his third felony conviction; he was sentenced to 25 years to life under California's "three strikes" law. The sentence in this case is harsh; from it, the majority opinion makes bad law.

On the basis of the prosecutor's peremptory challenge of *one* African American prospective juror, the majority opinion reverses a denial of habeas corpus and orders a new trial.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

The trial court enquired of and listened to the prosecutor's race-neutral reasons for using a peremptory strike against an African American prospective juror, weighed the evidence both for and against concluding that the strike was racially motivated, and decided the prosecutor was credible and that her reasons for making the strike were indeed race-neutral. The Court of Appeal affirmed.

In reversing this determination on the habeas petition, the majority opinion demeans demeanor evidence and nitpicks the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion. Instead of reviewing the evidence for clear error the majority conducted a de novo review in this case.

The majority opinion completely disregards the evidence supporting the trial judge's decision that the prosecutor was being truthful when she said she struck Juror 016 on the following permissible grounds: Juror 016 was young; the prosecutor thought Juror 016 appeared too tolerant for this type of case; Juror 016 had exhibited disrespect for the court by turning away and rolling her eyes when requested to answer "Yes" or "No" rather than "Uh-huh"; and Juror 016 was single, with no ties to the community.

The majority says it finds compelling evidence sufficient to overcome the deference it says it accords trial court credibility findings in three particulars: the prosecutor said that Jurors 016 and 019 were both young, when in fact 019 was a grandmother;[2/] the trial judge said he did not personally see Juror

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[2] This was an incorrect observation, but one not objected to or rebutted by defense counsel. From the colloquy it appears that everyone in that room knew the prosecutor meant to compare Juror 016 to Juror 006.

016 roll her eyes in disrespect;[3] and the prosecutor said she was also challenging Juror 016 due to her gender, a ground which the trial judge immediately rejected as unconstitutional.

The prosecutor's statement that Juror 016 rolled her eyes is critical to this case. If someone rolls her eyes when another speaks to her, the eye-rolling implies disrespect and rejection. The panel opinion concluded, irrationally, that because the trial judge did not see the eye-rolling, the state appellate court was unreasonable in approving the prosecutor's strike. The reason this is irrational is that it does not matter whether the state trial judge noticed the eye-rolling, or even whether there actually was any eye-rolling. All that matters is whether the prosecutor intentionally lied about the eye-rolling to make an excuse for getting an African American woman off the jury. If the prosecutor was really striking Juror 016 because she thought the juror rolled her eyes and not because she was African American, she had a right to strike her, even if she was mistaken about whether the eye-rolling actually occurred. In this case, the trial judge thought the prosecutor was telling the truth, and the state appeals court saw no reason to doubt it.

The record is uncontradicted that while the prosecutor was stating her reasons for the exercise of this single challenge, she was at all times within the sight of the trial judge, who observed her demeanor and sincerity. Indeed, at the end of counsel's presentation on the issue, the judge commented he would give the "benefit of the doubt" to the prosecutor's reason for the challenge.

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[3] Defense counsel remained mute as to whether she had seen Juror 016 roll her eyes in disrespect. California law allows the trier of fact to consider the failure to deny or explain contrary evidence as probative of that evidence. *See* CAL. EVID. CODE § 413; Cal. BAJI 2.04.

Without the benefit of the trial judge's observations and on a cold record containing ample evidence supporting the prosecutor's stated reasons for the strike, the majority concludes that the state court's findings amount to a misapplication of *Batson* and an objectively unreasonable deduction from the evidence presented.

That conclusion in effect eliminates the ability of the trial judge to make determinations of sincerity and credibility based on observation of counsel's demeanor in justifying a peremptory challenge. This is directly contrary to the teachings of the Supreme Court:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judge's province."

Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (citations omitted).

Although acknowledging *Hernandez*, the majority opinion in effect eliminates the rule that requires us to defer to the trial judge on credibility findings in *Batson* challenges. Now, our panels can pick and choose among bits of circumstantial evidence, whether or not that evidence was challenged at trial or on appeal, to determine whether an attorney was telling the truth in her reasons for peremptory strikes, without regard to

the attorney's demeanor.[4] *See* Judge Hall's dissent. 348 F.3d at 1100.

The value of the trial judge's observation of demeanor in determining credibility has long been a mainstay of our jurisprudence:

> There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility. As the Supreme Court stated in *Anderson v. City of Bessemer*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518[ ] (1985): "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575, 105 S. Ct. 1504[.] Live testimony enables the finder of fact to see the witness's physical reactions to questions, to assess the witness's voice—matters that cannot be gleaned from a written transcript. Because the district judge is able to hear testimony live and to view the witnesses as they testify, his credibility findings are entitled to deference on appeal.

United States v. Mejia, 69 F.3d 309, 315 (9th Cir. 1995).

The prosecutor represented that she saw Juror 016 roll her eyes in disrespect for the trial court, and the trial judge believed she was truthful. The majority opinion now requires the trial judge to detail why he thought the prosecutor *was*

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[4] This directly conflicts with the California jury instruction that allows juries to consider "the demeanor and manner of the witness while testifying" in determining the believability of a witness. *See* Cal. BAJI 2.20. If juries are allowed to weigh a witness' credibility, there is no logical reason a trial judge cannot do the same.

credible, or else this court will presume she was *not*. Why we should presume a prosecutor, who is an officer of the court, is not credible when the trial judge found that she was is beyond all logic. For a contrary result in a similar case, see *Williams v. Rhoades*, 354 F.3d 1101 (9th Cir. 2004), which properly accorded deference to the trial judge's findings in a *Batson* challenge.

In addition, the panel's opinion, although citing 28 U.S.C. § 2254(d), departs from the spirit, if not the letter, of the statute in its application of the statute to the facts in this case. As noted, the panel substitutes its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court. The panel then insists that any perspective other than its own, must be unreasonable. In my opinion, this is not consistent with the statute's limitation of federal habeas relief to instances where the state court decision "was contrary to, or involved an unreasonable application of clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

En banc rehearing was necessary to avoid arguments between counsel battling over whether the standard in *Collins* or the standard in *Williams*[5] applies. Those battles will now rage with no end in sight. Accordingly, I respectfully dissent from the denial of rehearing en banc.

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[5] *See Williams v. Rhoades*, 354 F.3d 1101 (9th Cir. 2004) where three African Americans were struck, habeas relief denied, and that denial affirmed by this court.

OPINION

PAEZ, Circuit Judge:

Steven Collins appeals the district court's order denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. During jury selection prior to his state court trial for possession of a controlled substance, Collins, an African-American male, alleged that race motivated the prosecutor's peremptory strikes against two African-American women in the jury venire in violation of *People v. Wheeler*,[1] but the state trial court rejected Collins' *Wheeler* motion. The jury found him guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of twenty-five years to life in state prison.[2] The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we conclude that the California Court of Appeal's decision that the prosecutor did not engage in purposeful discrimination during jury selection represents (1) an unreasonable determination of the facts in light of the evidence presented at trial, and (2) an objectively unreasonable application of clearly established law. Accordingly, we reverse with instructions to grant the petition.

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[1] 22 Cal. 3d 258 (1978).

[2] *See* Cal. Penal Code Ann. § 667(e)(2)(A) (West 1999).

BACKGROUND

After Collins was discovered in possession of 0.10 grams of powder cocaine in March 1996, the State of California charged him with possession of a controlled substance in violation of California Health and Safety Code section 11350(a). When jury selection began, the trial court excused ten of the original thirty-three members of the venire. Of the remaining twenty-three, three appeared to be African-American.[3]

During voir dire, Juror 016, one of two African-American women in the venire, stated that she lived in Inglewood, California, was single, had no children, no prior jury experience, no prior employment experience in law enforcement, and worked as an automations clerk for the Federal Aviation Administration. She also stated that no one close to her had ever been accused of a drug-related offense, nor had anyone close to her had a problem with alcohol or drugs, and that she had no reason to believe that drug dealers operated in her neighborhood. When asked whether she thought that possession of rock cocaine ought to be against the law, she answered "yes." Juror 016 also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on a case involving drug charges. The prosecutor exercised a peremptory challenge to excuse Juror 016.

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[3] At a later point in the proceeding, the prosecutor argued that there were in fact four African-American jurors in the venire. She identified one female juror as being "of African-American color, black color," but defense counsel clarified that although she was a "woman of color," this juror was not in fact African-American.

Juror 019, the other African-American woman in the venire, told the court that she lived in Inglewood, California, was single with seven grown children,[4] and was currently a retired nurse. She also stated that she had no relatives or close friends in law enforcement and had never had an experience with a police officer that was "particularly positive or particularly negative." At one time, her youngest daughter had a problem with drugs. Juror 019 had no idea what kind of drugs but thought that it might have been cocaine. Juror 019 stated that she "was involved in" her daughter's struggle with addiction and "had to help her," but that she did not think that anything about her relationship with her daughter or the daughter's cocaine problem would affect her ability to be fair and impartial in Collins' case.

After the prosecutor exercised another peremptory challenge to excuse Juror 019, defense counsel made a motion pursuant to *People v. Wheeler*, 22 Cal. 3d 258,[5] alleging that the prosecutor had improperly dismissed Jurors 016 and 019 on the basis of race. The trial court determined that Collins had established a prima facie case of racial discrimination and

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[4] When asked to provide her children's occupations, Juror 019 stated that "[t]he oldest one is a computer manager for a company in Van Nuys. Another one is a clinical social worker, works for herself now. One son has his own mechanic shop; one does not work. The other one is in Arizona working for McDonnell Douglas. The youngest is at home with five kids."

[5] *Wheeler* is the "California analogue" to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 n.5 (9th Cir. 2003). Although aspects of *Wheeler* differ from *Batson*, notably the requirements for establishing a prima facie case of discrimination, *see Copperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001), the state trial court's finding that Collins established a prima facie case is not in dispute. Because the relevant aspects of the two cases are the same, and because we are reviewing Collins' petition for a writ of habeas corpus under 28 U.S.C. § 2254, we refer to *Batson* in analyzing his claims.

thus asked the prosecutor to justify her peremptory challenges. The prosecutor responded:

> Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant of this type of case. Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. She and Mr. 006 were both single, no ties.
>
> [Defense Counsel]: Who is 006?
>
> [Prosecutor]: He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

The judge, outside the presence of the prospective jurors, asked the prosecutor if she had any additional justifications to offer for striking the two African-American female jurors. The following colloquoy took place:

> [Prosecutor]: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is a male and there is a male African-American on the jury that has been on it since the beginning, I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of

African-American color, black color, on the jury, still seated. That is it, your honor, at this point. Does the court need cases for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area?

The Court: I'll let you know. [Defense counsel], would you like to be heard?

[Defense counsel]: Yes. [Prosecutor] has talked about looking for more male/female balance. I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [Prosecutor] has compared Ms. 016 to Mr. 006, who she excused by saying they are both young and she didn't feel she was getting enough information. If she wanted more information, she could have asked the court to ask more questions of Ms. 019 . . . .

The Court: [Prosecutor], do you have any authority to cite to the court that gender is not a suspect classification in the usage of peremptory challenges?

[Prosecutor]: I don't have exact citations here for the court, but *People v. Ortega*, which also talks about the jury being balanced between young and old and men and women.

. . .

The Court: I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see, [Prosecutor], that you are seeking to justify excusing people of one

> ethnicity based on their gender. I don't think that is going to cut it.
>
> [Prosecutor]: I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could—that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

After considering these arguments, the court denied the *Wheeler* motion. With regard to Juror 019, the court stated that it was "satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 019's experiences with a family member who had a drug problem." As to Juror 016, the court stated that it, "frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney. However, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016."

After sentencing, Collins appealed his conviction and properly exhausted his remedies in both the California Court of Appeal and the California Supreme Court. Collins challenged the trial court's denial of his *Wheeler* motion only with respect to Juror 016. On November 19, 1998, Collins filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. Ultimately, the district court dismissed his petition. Noting that the trial court had not observed Juror 016's demeanor, the district court concluded that it had to respect the trial court's decision to give the prosecutor the benefit of the doubt because Collins had not rebutted this decision with "clear and convincing evidence." The district court subsequently granted Collins' request for a cer-

tificate of appealability as to "[w]hether the petitioner's rights were violated under *Batson v. Kentucky* . . . where the prosecution exercised a peremptory challenge against an African-American juror ostensibly on the ground of the juror's age and demeanor."

I.

Because the California Supreme Court denied Collins' petition for review without comment, our analysis begins with the decision of the California Court of Appeal, an unpublished disposition. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1077, 1079 n.2 (9th Cir. 2000). In affirming the trial court's ruling, the state appellate court adopted the reasons cited by the trial court; thus, our analysis "will necessarily include discussion of the trial court's decision as well." *Lewis*, 321 F.3d at 829.

The California Court of Appeal determined that "because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective [J]uror [N]o. 016 based solely on her age." Citing both *Wheeler* and *Batson*, the state appellate court further rejected Collins' contention that age was an improper basis upon which to justify a peremptory challenge, noting that age groups are not a cognizable class and that peremptory challenges to "youthful and/or immature prospective jurors repeatedly have been upheld as proper." Even assuming that the prosecutor's reliance on Juror 016's young age was improper, the appellate court alternatively concluded that the trial court had engaged in a sincere and reasoned attempt to evaluate the prosecutor's justification, as "[j]urors may be excused on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." Noting that "nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective [J]uror [N]o. 016's

demeanor, indicates that the trial court did not approach its task appropriately," the appellate court determined that the trial court's de ision was entitled to deference.

We review Collins' petition according to the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), as Collins filed his petition after April 24, 1996. We may only reverse a judgment of the state that was adjudicated on the merits if the state's decision was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1041 (2003), or if the state court's decision was "contrary to, or involve[s] an unreasonable application of, clearly established Federal law" as determined by "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," *Andrade*, 123 S. Ct. at 1172 (citations omitted). We further note that the ultimate determination of whether the prosecutor evidenced an intent to discriminate in dismissing Juror 016 is a question of fact, *see Hernandez v. New York*, 500 U.S. 352, 367 (1991), and that under section 2254, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Collins therefore must prove that the state court's decision was " 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1045.

II.

[1] The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson*, 476 U.S. at 89. Where a defendant asserts that a prosecutor's

peremptory challenges were racially-motivated, a court must apply a three-step process for evaluating a *Batson* claim. *Hernandez*, 500 U.S. at 358-60. First, the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id.*[6] Once a prima facie case is established, the burden shifts to the state to articulate a race-neutral explanation for the challenge. If the first two steps are satisfied, the court must then determine whether the defendant has carried his ultimate burden of proving purposeful discrimination.

A.

[2] Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation—an explanation "based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam). In assessing the race-neutrality of the prosecutor's explanation, we "must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359. At this step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Stubbs v. Gomez*, 189 F.3d 1099, 1105 (9th Cir. 1999) (internal quotation marks omitted). Although the prosecutor must give a " 'clear and reasonably specific' explanation of his 'legitimate' reasons" and "the reason must be 'related to the

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[6] We need not address the preliminary issue of whether Collins made a prima facie showing because the trial court ruled on the ultimate question of intentional discrimination under steps two and three of the *Batson* analysis. *Hernandez*, 500 U.S. at 359; *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir. 1999).

particular case to be tried,' " *Purkett*, 514 U.S. at 768-69 (quoting *Batson*, 476 U.S. at 98 & n.20), "it is not until the *third* step that the persuasiveness of the justifications becomes relevant." *Id.* at 768. For purposes of step 2, the prosecutor's explanation need not be "persuasive, or even plausible." *Id.*

The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be "too tolerant for this type of case," (2) her demeanor, (3) her marital status—"single" with "no ties," (4) her lack of ties to the community, and (5) her gender.[7] The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The California Court of Appeal concluded that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral.

[3] Although Collins concedes that the prosecutor's explanations for striking Juror 016 "may appear to be race-neutral on their face," citing *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992), he contends that rolling of the eyes, lack of ties in the community, and youthful age are not characteristics that would affect a juror's approach to a specific trial and therefore the prosecutor's explanations were "transparent proxies for racism." However, as Collins acknowledges, "[a]t this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation," *Hernandez*, 500 U.S. at 360 (emphasis added), and, unlike the justifications offered in *Bishop*, 959 F.2d at 825, youthful age and the demeanor in question are not characteristics peculiar to a given race or

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[7] As evidence that she did not dismiss Jurors 016 and 019 because of their race, the prosecutor also noted that an African-American man and "a female juror that is of African-American color, black color" remained on the panel.

"group-based presuppositions applicable in all criminal trials" to African-American jurors. *Id.*

[4] Further, neither the Supreme Court nor any circuit has held that the Equal Protection Clause prohibits a prosecutor from striking potential jurors on account of age. *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993). Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 is not contrary to, or an unreasonable application of, clearly established law. Alternatively, if the prosecutor had excluded Juror 016 because of her demeanor, this justification would not constitute a denial of equal protection, as discriminatory intent is not inherent in the prosecutor's explanation. *Hernandez*, 500 U.S. at 360. Because we find no error in the California Court of Appeal's analysis at step 2, we proceed to step 3.

B.

In the third step of a *Batson* challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98, and therefore must evaluate the "persuasiveness" of the prosecutor's proffered reasons, *see Purkett*, 514 U.S. at 768. In determining whether the defendant has carried this burden, the Supreme Court provides that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Hernandez*, 500 U.S. at 363. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768; *see also Lewis*, 321 F.3d at 830 ("[I]f a review of the record undermines the prosecutor's

stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.")

In the end, a finding of discriminatory intent turns largely on the trial court's evaluation of the prosecutor's credibility, *see Batson*, 476 U.S. at 98 n.21, because "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis," *Hernandez*, 500 U.S. at 367. Indeed, "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040. Although we afford great deference to the trial court's observations of the prosecutor's demeanor and intent, "[d]eference does not by definition preclude relief." *Id.* at 1041; *see also Lewis*, 321 F.3d at 821 ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge."); *United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989) (holding that although reasons given by a prosecutor "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (noting that courts are not required to accept neutral reasons that are either unsupported by the record or are refuted by it).

In assessing the prosecutor's proffered justifications for excluding Juror 016, the state trial and appellate courts made unreasonable factual determinations in light of the evidence presented in the state court proceeding and unreasonably

applied clearly established federal law as determined by the Supreme Court. With a careful eye towards "such circumstantial and direct evidence of intent as [was] available" to the appellate court, *Batson*, 476 U.S. at 93 (internal quotation marks omitted), we address each of the justifications relied upon by the California courts.

1. Age

The state court of appeal determined that the prosecutor had dismissed Juror 016 solely on the basis of her age. The court explained that because youth was not a cognizable class for purposes of the cross-section rule and because youth had been recognized as a permissible justification for dismissal in the past, Collins had failed to demonstrate purposeful discrimination. However, the appellate court's conclusion is troubling in several respects.

[5] First, although age has been upheld as a proper basis for excusing a potential juror, *see Pichay*, 986 F.2d at 1259, here, the prosecution explained that Juror 016's youthful age might make her "too tolerant for this type of case." Thus, the prosecutor attempted to equate her youthful age with a possible bias favoring criminal defendants facing drug charges. The prosecutor also later explained that Juror 016's youthful age was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and 019]; that was one factor that I considered, that is, the manner in which I stated that they could — that their youth was important."

[6] According to the Supreme Court, Juror 016's age must be "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and must have some relevance to Juror 016's "possible approach to a specific trial," *Bishop*, 959 F.2d at 825. Indeed, although the prosecutor claimed that Juror 016's youthful age was of concern, she later explained that it was *not* the general

presence of young jurors on the jury that concerned her. Rather, in referring to Jurors 016 and 019, the prosecutor stated "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Thus, in explaining that she was not trying to exclude all young jurors from the jury, the prosecutor clarified that her reason for excluding Juror 016 was not her youthful age at all. Instead, her reason for excluding Juror 016 related to particular characteristics that the prosecutor associated with her youth—namely, the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community.[8]

The state court of appeal, however, glossed over the prosecutor's clarification and found that the sole basis upon which the trial court had permitted the prosecutor to exclude Juror 016 was her age. It concluded that because the exclusion of jurors on the basis of their age did not violate the Fourteenth Amendment, Collins had failed to meet his burden of proving purposeful discrimination. However, the state appellate court's characterization of the prosecutor's reason for striking Juror 016 was "based on an unreasonable determination of the facts in light of the evidence presented in the State court pro-

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[8] The fact that the trial court acknowledged that Juror 016 "was a youthful person, as was 006[, a]nd one or more other prospective jurors also," is of no moment. Although the trial court seemed to credit the prosecutor's proffered youthful age justification by a cross-racial comparison of youthful jurors who were excused (the record implies that Juror 006 was not a member of a racial minority), the court ignored the prosecutor's clarification that she did not strike Juror 016 because of her "youth," but rather because Juror 016 may have been "too tolerant for this type of case."

We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 "was a youthful person, as was 006." Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to establish just how old Juror 016 might have been.

ceeding." 28 U.S.C. § 2254(d)(2). Indeed, the evidence in the trial record is clear and convincing that the prosecutor's proffered justifications for striking Juror 016 on the basis of her youthful age—possible tolerance of drug use and lack of ties to the community—were pretexts for purposeful discrimination.

With regard to Juror 016's possible tolerance,[9] during voir dire, Juror 016 answered "yes" to the court's question regarding whether she believed that possession of cocaine should be against the law, and she also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on Collins' case. There is no other evidence in the record that remotely suggests that Juror 016 was otherwise sympathetic to or tolerant of individuals involved with drug use or possession. Juror 016 told the court that neither she nor her family members or any of her close friends had ever had a problem with drugs or alcohol; nor had they ever been accused of committing a crime involving illegal drugs. No other information regarding drug use, drug laws, or criminal enforcement of drug laws was solicited by the court or counsel, and Juror 016 never gave the court any information regarding her age. The prosecutor's clarification that Juror 016 might be "too tolerant for this type of case" as a basis for striking Juror 016 is therefore contrary to the evidence in the record. *See Purkett*, 514 U.S. at 768 ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (rejecting prosecutor's attempt to attribute to chal-

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[9] Although the fact that Juror 016's purported tolerance "corresponds to a valid for-cause challenge [helped] demonstrate its race-neutral character" at step 2, *Hernandez*, 500 U.S. at 363, the fact that nothing in the record supports the prosecutor's claim erodes the credibility of her explanation at step 3.

lenged juror "beliefs that she did not hold" about "mistrust[-ing] the system," where juror never made such a statement and indicated to the court that she did believe her son had been treated fairly by "the system").

The prosecutor later attempted to explain that Juror 016 was "single, no ties," presumably indicating that she was not married and possibly had no children. However, as we have already explained, *Batson* is clear that the prosecutor's proffered justifications must be reasonably "related to the particular case to be tried." 476 U.S. at 98; *see also Bishop*, 959 F.2d at 825 (stating that a prosecutor's reason for dismissing a potential juror must have some nexus to her "possible approach to a specific trial"). The trial court record fails to establish how Juror 016's marital or parental status would have had any bearing on her ability to serve as a juror in a case involving prosecution for crack cocaine possession, and the prosecutor failed to offer any such explanation. Further, the record shows that the prosecutor did not strike Juror 015, a white juror who possessed the same objective characteristics as Juror 016: both were single, employed females with no children who responded to the court's questions in the same manner, thereby revealing the pretextual nature of this justification.[10] *See United States v. Alanis*, 335 F.3d 965, 969 (9th Cir.

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[10] The prosecutor attempted to prove the race-neutral character of this justification by comparing Juror 016 with Juror 006, a white male, noting "[s]he and Mr. 006 were both single, no ties." *See Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."). The record reveals, however, that Jurors 016 and 006 had very different backgrounds and thus did not possess "comparable characteristics" for purposes of the cross-racial analysis discussed in *Turner*. Juror 006, like Juror 016 was single, but, in contrast to Juror 016, Juror 006 had never been employed and, significantly, had an uncle who was a recovered alcoholic. This evidence is inconsistent with the prosecutor's assertion that there was a white juror with comparable characteristics who was dis-

2003) ("Peremptory challenges cannot be lawfully exercised against potential jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged."); *Lewis*, 321 F.3d at 832-33 ("[A] comparative analysis of D.F. with empaneled jurors reveals that a finding of pretext was warranted."); *McClain*, 217 F.3d at 1221-22 (holding that where a non-black juror with no prior jury experience was empaneled, the proffered reason for striking a black juror for lack of jury experience was not genuine and therefore was pretextual); *cf. Miller-El*, 537 U.S. 322, 123 S. Ct. at 1043 (noting the fact that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" showed that the strikes "might have been selective and based on racial considerations").

[7] The prosecutor also claimed that Juror 016's youth was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and Juror 019]; that was one factor that I considered, that is, the manner in which I stated that they

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missed for being single with no children. *Compare Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994) (holding that counsel may treat minority and nonminority jurors differently when there are subjective differences between them, although that party cannot insulate an explanation from appellate review simply by couching it in "vague and subjective terms") *with Turner*, 121 F.3d at 1251-52 (perceiving no basis to distinguish a challenged and unchallenged juror and holding that their similarity provided evidence of pretext); *cf. United States v. Lewis*, 837 F.2d 415, 417 & n.5 (9th Cir. 1988) (concluding that there was no evidence of pretext when the decision to strike the juror turned on "the interplay of various factors" identified by the prosecutor and "no unchallenged juror possessed all the cited characteristics").

We further note that, contrary to the suggestion made by the dissent, because Jurors 006 and 016 did not possess comparable characteristics, the comparison between the two did not provide a potential reason for the trial court to conclude that the prosecutor was credible.

could — that their youth was important." Not only is the prosecutor's statement that Juror 016 had a "lack of ties in the community" not sufficiently "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, but it is also not supported by the record and does not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. *See id.* at 88 (holding that the prosecutor's exercise of peremptory challenges must be "related to his view concerning the outcome") (internal quotation marks omitted); *McClain*, 217 F.3d at 1223 (stating that where the prosecutor did not explain the significance of a juror's body language, the prosecutor's claim that he struck that juror "on the sole basis that she had her elbow on the chair is patently frivolous," especially where no other evidence in the record indicated any possible bias).

[8] In sum, there was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age. This evidence supports Collins' claim that the prosecutor struck Juror 016 because of her race, and also demonstrates that the state appellate court was unreasonable when it determined that the trial court did not err by determining that Collins had failed to prove purposeful discrimination. However, because the appellate court offered Juror 016's demeanor as an alternative explanation, we must assess whether the court unreasonably determined that the trial court had properly accepted that justification as nondiscriminatory before determining the ultimate significance of the appellate court's conclusion regarding Juror 016's age.

2. Demeanor

The state court of appeal also concluded that even if the prosecutor's reliance on Juror 016's youthful age had been improper, the "prosecutor reasonably could have interpreted prospective [Juror 016's] body language as indicative of hostility or disrespect" and properly dismissed her on that basis. Although the trial court did not witness Juror 016's alleged offensive conduct, the appellate court determined there was "*nothing* in the present record" indicating that the trial court should not have given the prosecutor the benefit of the doubt or that it had failed to evaluate whether the prosecutors' justifications should have been accepted.

As the record reflects, the state appellate court reasonably determined that the trial court had not observed Juror 016's demeanor but nonetheless accepted this alternate reason for striking Juror 016 on the basis of the prosecutor's credibility. Because the trial court did not observe Juror 016's demeanor, the critical question here is whether the appellate court's determination that the trial court properly credited the prosecutor's representation was unreasonable.[11/] Notably, the basis

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[11] In response to the prosecutor's characterization of Juror 016's alleged conduct, the trial court responded: "the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney." In light of the trial court's statement and the fact that there is nothing in the trial transcript (except the prosecutor's representation) which indicates that Juror 016 answered any question by stating "uh-huh" or that she had rolled her eyes or turned away, the appellate court reasonably determined that the trial court had accepted the prosecutor's statements about Juror 016's demeanor as true. Its corresponding conclusion—that a peremptory challenge exercised on the basis of a juror's body language would not be improper—was also reasonable. *See Burks*, 27 F.3d at 1429 & n.3 (noting that trial counsel's evaluation of a potential juror's demeanor, tone, and facial expressions may lead to a "hunch" or "suspicion" that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate); *United States v. Power*, 881 F.2d 733, 740 (9th Cir.

for the state appellate court's determination was its conclusion that there was "nothing in the present record" to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility. We conclude that this determination was an unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking Juror 016.

First, we note that the prosecutor consistently identified Jurors 016 and 019 as "both young."[12] However, the record reveals that Juror 019 was at least a middle-aged grandmother. Indeed, Juror 019 informed the court that she was a retired nurse with seven grown children, the youngest of which had five children of her own. A prosecutor supplied with this information could not credibly identify Juror 019 as young. This incorrect factual statement supports Collins' argument that the prosecutor was not credible. *See McClain*, 217 F.3d at 1222 (holding that reasons for excusing black jurors that were objectively contradicted by the record pro-

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1989) (accepting as legitimate the government's explanation that a juror's "fidgeting and looking around as he sat in the jury box . . . made the prosecutor believe that the individual would not be an attentive juror").

[12] Although Collins does not challenge the prosecutor's strike against Juror 019, this strike is relevant to Collins' *Batson* challenge because the prosecutor labeled Juror 019 "young" even though Juror 019 was a grandmother. *See Hernandez*, 500 U.S. at 363 (holding that a prosecutor's motive "may often be inferred from the totality of relevant facts") (internal quotation marks omitted); *Purkett*, 514 U.S. at 768-69 (holding that at step three, the trial court must evaluate the persuasiveness of the prosecutor's justification); *Batson*, 476 U.S. at 98 (holding that the trial court must decide whether the prosecutor's explanation for the strike is pretextual); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (noting that the trial court "has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances").

vided evidence of purposeful discrimination); *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998) (holding that serious questions of pretext arise when the facts in the record are "objectively contrary to" the prosecutor's proffered justifications).

In addition, the trial court judge rejected the prosecutor's justification for striking Jurors 016 and 019 on the basis of gender. This too supports the argument that the prosecutor dismissed Juror 016 on the basis of her race.[13] *See Lewis*, 321 F.3d at 834 (stating that the fact that the trial court had found some of the prosecutor's arguments unconvincing "does not support the prosecutor's credibility; it undermines it"). Further, the fact that the prosecutor attempted to offer a facially discriminatory justification for dismissing the only black female jurors in the venire, and then quickly abandoned this justification when informed by the trial judge that it was improper, is another indication that the prosecutor's stated justifications were a pretext for discrimination. *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040 ("Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are.").

The prosecutor's objectively unreasonable statements regarding Juror 019's age, and her attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019, combined with her pretextual justifications for dismissing Juror 016 on the basis of her alleged lack of community ties, her marital status, and her purported tolerance, and the fact that nothing in the record corroborated her allegations regarding Juror

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[13] In rejecting the prosecutor's initial references to gender, the trial court explained: "I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see . . . that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it."

016's demeanor, provide "clear and convincing evidence" that the prosecutor did not dismiss Juror 016 on the basis of her demeanor. In light of the evidence in the record, the appellate court's determination that the prosecutor dismissed Juror 016 because of her demeanor was an unreasonable determination of the facts. Because this determination provided the basis for the appellate court's conclusion that the trial court had not clearly erred in accepting the prosecutor's justification as race-neutral, this determination also was objectively unreasonable. *See Johnson*, 3 F.3d at 1331 ("When there is reason to believe that there is a racial motivation for the challenge," we are not "bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it."); *Lewis*, 321 F.3d at 833-34 (holding that where justification for strike was not corroborated by the record and the prosecutor was not credible, the proffered justification could not support state court's conclusion that petitioner had failed to prove purposeful discrimination).

C.

The state court of appeal held that Collins had failed to establish purposeful discrimination on the basis of its objectively unreasonable determination that the prosecutor properly dismissed Juror 016 because of her age. The appellate court's alternative ruling—that the trial court properly credited the prosecutor's assertion that Juror 016 had rolled her eyes and turned away from the court when asked a question during voir dire, and that her dismissal based on Juror 016's demeanor did not provide any evidence of purposeful discrimination—is also unsupported by the record. Thus, clear and convincing evidence demonstrates that there was no credible basis for dismissing Juror 016 on the basis of her age or demeanor.

[9] There is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race—evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.[14]

In order to secure habeas relief, however, Collins "must demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1045. We conclude that Collins has met this heavy burden.

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[14] The fact that a black man and "a female juror that [was] of African-American color, black color" remained in the venire does not alter our conclusion. *See Turner*, 121 F.3d at 1254 ("[A]lthough the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive, [ ] it is not dispositive."); *Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir. 1993) ("[A] trial court may consider, but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*.").

1.

[10] The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justifications that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins' claim of pretext, however, is supported by the record—the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record . . . indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).[15]

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[15] Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court *can disagree* with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 123 S. Ct. at 1041; *see also Hall v. Dir. of Corrs*, 343 F.3d 976, 984 n.8 (9th Cir. 2003) ("AEDPA, although emphasizing proper and due def-

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Further, although the appellate court identified the three-step inquiry for identifying purposeful discrimination under *Batson*, it unreasonably applied *Batson*'s third prong in determining that the trial court had fulfilled its *duty* to determine whether Collins had established purposeful discrimination. *See Andrade*, 123 S. Ct. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). It is well-established that "once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, the trial court then has the *duty* to determine if the defendant has established purposeful discrimination." *Hernandez*, 500 U.S. at 363 (emphasis added) (internal quotation marks omitted); *id.* at 359 (holding that the "trial court *must* determine whether the defendant has carried his burden of proving purposeful discrimination") (emphasis added); *Batson*, 476 U.S. at 98 ("The trial court will then have the *duty* to determine if the defendant has established purposeful discrimination.") (emphasis added). As the Supreme Court has emphasized, "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,' " *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and must evaluate the "genuineness of the [prosecutor's] motive," *Purkett*, 514 U.S. at 769. Thus, a state appellate court's decision that overlooked a trial court's failure to evaluate the persuasiveness of the

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erence to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye."). Critical to our analysis are the ten different reasons offered by the prosecutor for dismissing Jurors 016 and 019. As our analysis reflects, one of the reasons was facially discriminatory, two reasons were contradicted by the record, one reason was not applied to a comparably similar juror who was not struck, and four reasons were without any support in the record.

prosecutor's justifications in conducting this inquiry would rest on an unreasonable application of well-established Supreme Court precedent. *See Lewis*, 321 F.3d at 832 ("Unlike the trial court, a court of appeal is not in an ideal position to conduct a step three evaluation. It can, however, use the trial court's findings and the evidence on the record to evaluate the support on the record for the prosecutor's reasons and credibility, and to compare the struck and empaneled jurors.")

Here, the appellate court's determination that "nothing in the present record" indicated that the trial court failed to evaluate the prosecutor's credibility must have been based either (1) upon a conclusion that there was no evidence that undermined her credibility or (2) upon a belief that the record demonstrated that the trial court had assessed any such evidence in evaluating the persuasiveness of the prosecutor's justification. The record belies either conclusion.

[11] As we have discussed, the prosecutor's attempt to justify her challenge of Juror 016 on the basis of her age, specifically on account of her marital status, her alleged lack of community ties, and her purported tolerance, was unsupported by the record. In addition, the prosecutor's attempt to justify her strike of Juror 019 on the basis of her youthful age was contradicted by the record. The trial court acknowledged that it had not observed Juror 016's alleged demeanor, and nothing in the record corroborates the prosecutor's allegations. It also rejected the prosecutor's justifications relating to gender as clearly violative of the Fourteenth Amendment. Thus, contrary to the appellate court's assessment of the record, the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016. The appellate court's contrary determination demonstrates that, although it recognized the trial court's duty under *Batson*

to determine whether Collins had shown purposeful discrimination, it unreasonably applied that principle in concluding that the trial court had done so.

IV.

[12] Because the basis for the appellate court's decision was its unreasonable determination of the facts in light of the evidence presented at the trial, and because it also unreasonably applied clearly established federal law as determined by the Supreme Court, we conclude that the state trial appellate court committed constitutional error that warrants the grant of a writ of habeas corpus under section 2254. We therefore reverse the district court's judgment and remand with instructions to grant the petition on conditions it deems appropriate.[16]

REVERSED and REMANDED.

HALL, Circuit Judge, dissenting:

The state trial court determined that the prosecutor's proffered race-neutral justifications for striking Juror 016 were credible. This conclusion is entitled to "great deference," *Hernandez v. New York*, 500 U.S. 352, 364 (1991), and may not be disturbed on appeal unless clearly erroneous. *Id.* at 369; *see also Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003) (reasoning that because an appellate court has access only to the trial transcript, it is "not as well positioned as the trial court is to make credibility determinations."). Applying this deferential standard, the California Court of Appeal found that the trial court did not err. Because this case is governed by AEDPA, we must defer to the California Court of

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[16] In light of our disposition, we need not address Collins' 8th Amendment argument that his three strikes sentence was cruel and unusual. *But see Andrade*, 123 S. Ct. 1166.

Appeal's conclusion unless contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or premised on an unreasonable factual finding. 28 U.S.C. § 2254(d).

The majority does not defer to the California Court of Appeal. According to the majority, deference is unwarranted because the Court of Appeal's decision rests upon the "unreasonable factual determination" that "there was 'nothing in the present record' to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility." In point of fact, the Court of Appeal held only that the trial court's *ultimate* decision to credit the prosecutor was not clearly erroneous, thereby adhering to the well-established principle that "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369.

Having manufactured a reason to disregard the California Court of Appeal's decision, the majority essentially reviews the issue of the prosecutor's credibility *de novo*, concluding that the writ should issue because, under the majority's view, "the record belies" the conclusion that the trial court assessed evidence which ostensibly undermined the prosecutor's credibility. In doing do, the majority disregards the canonical rule that evaluation of a prosecutor's credibility "lies peculiarly within a trial judge's province," and is entitled to "great deference." *Id.* at 366.[1/]

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[1] Contrary to the majority's view, the state appellate court has no duty to make its own purposeful discrimination determination. Indeed, this would be beyond the scope of the state appellate court's review. In the *Batson* context, a state appellate court's duty is limited to determining whether the *trial court's* purposeful discrimination finding was *clearly erroneous*. *E.g.*, *Hernandez*, 500 U.S. at 366-67.

Viewing the record in its entirety, I am firmly convinced that the California Court of Appeal's decision was reasonable. I respectfully dissent.

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The majority identifies four considerations potentially relevant to the prosecutor's credibility. In order to reject the California Court of Appeal's decision, we would have to conclude that the Court of Appeal *unreasonably* determined that, given these four considerations, the trial court did not *clearly err* by crediting the prosecutor's race-neutral explanation. As the following discussion illustrates, the majority falls far short of making this requisite demonstration.

The majority argues that the trial court should have questioned the prosecutor's credibility because she referred to *another* prospective juror, Juror 019, as "young" even though Juror 019 was a grandmother of five. As the majority suggests, the prosecutor may have either been entirely incapable of judging a person's age or may have intentionally misrepresented Juror 019's age to the court. A far more plausible explanation, on the other hand, is that the reference to Juror 019 as "young" was purely accidental. The statement at issue occurred during a discussion about Juror 016, Juror 019, and Juror 006, a young, single white male against whom the prosecutor also exercised a peremptory strike. Because Jurors 016 and 019 were the subject of the *Batson* challenge, both jurors were repeatedly referred to in tandem. Similarly, Jurors 016 and 006 were referred to together several times by the prosecutor, who argued that the two young, single jurors were similarly situated. In this context, it is not surprising that the prosecutor would, on one occasion, flip the designations "006" and "019." Indeed, defense counsel also seemed confused about the numerical designations, once mistakenly

referring to Juror 016 as "Ms. 019."[2] Both the trial judge and defense counsel clearly indicated that they understood the prosecutor's justification for striking Juror 019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant.[3] Under these circumstances, the majority's focus on the prosecutor's misstatement,[4] an issue that was not briefed by the parties, is nothing short of absurd.

The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral justifications, including Juror 016's demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications

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[2] After noting that one of the prosecutor's justifications for striking *Juror 016* was a lack of information, defense counsel argued, "if [the prosecutor] wanted more information, she could have asked the court to ask more questions of *Ms. 019*."

[3] Summarizing the prosecution's argument, defense counsel stated: "[The prosecutor] has compared Ms. 016 to Mr. 006, which she excused by saying they were both young. . . . And Ms. 019, certainly, indeed, said that she had . . . one daughter which she said had a cocaine problem and that she had been involved with treatment for the daughter."

[4] Indeed, the prosecutor's "incorrect factual statement" is the majority's lead argument in support of its conclusion that the trial court clearly erred in considering the prosecutor to be credible.

offered by that prosecutor.[5] In the instant case, the trial judge rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights nothing in the record to indicate that the California Court of Appeal should have deemed this decision *clearly erroneous*.

The third credibility issue raised by the majority also relates to Juror 019 rather than Juror 016. Making an argument not presented by Collins either before this court or before the California Court of Appeal, the majority contends that the prosecution's explanation that Juror 019 had a daugh-

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[5] The majority quotes this court's decision in *Johnson v. Vasquez*, 3 F.3d 1327 (9th Cir. 1993), for the proposition that " '[w]hen there is reason to believe that there is a racial motivation for the challenge,' we are not 'bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.' " *Id.* at 1331. This reference is misleading, however. First of all, the *Johnson* court was confronted with a case in which the prosecutor's own statements "strongly suggest[ed] that [he] responded to defense counsel's alleged exclusions of other minority venire members by excluding a member of defendant's race." *Id.* at 1330. Hence, this court's admonition that "when there is reason to believe that there is a racial motivation for the challenge . . . we are not bound" was a direct reference to the prosecutor's tacit admission that he was excluding members of the venire based on their ethnicity, an integral element of the *Johnson* decision which is not present in the instant case.

Second, the majority omits crucial language from the *Johnson* decision which bears on its relevance to the case at bar. Specifically, we noted that "*neither the trial courts nor we* are bound to accept" the prosecutor's ostensibly neutral rationales at face value. *Id.* at 1331 (emphasis added). Viewed in context, the language from our *Johnson* decision clarifies the majority's fundamental mistake in this case. Once the trial court decides to "accept at face value" a "list of neutral reasons" proffered by the prosecutor, we are bound by precedent to grant that decision "great deference." *Hernandez*, 500 U.S. at 366.

Finally, even if the language from *Johnson* were pertinent to the instant case, it nonetheless fails to dispute the point that, even if a trial or appellate court chose not to accept *one* (or more) of the prosecutor's articulated justifications, they would not thereby be compelled to reject *all* of the proffered rationales.

ter recently treated for cocaine addiction was pretextual because a white juror passed by the prosecution, Juror 030, also had a child with a cocaine problem. There are several fundamental problems with the majority's analysis of this issue. The issue was not briefed by the parties or discussed at oral argument, and the record itself certainly does not contain clear and convincing evidence that Juror 019 and Juror 030 were, as the majority terms them, "indistinguishably similar."[6] Moreover, even if one accepts the majority's shaky premise that Jurors 019 and 030 were "indistinguishably similar," there is no Supreme Court precedent indicating that a race-neutral justification is necessarily pretextual merely because it applies to another member of the venire. Similarly, there is a complete dearth of Supreme Court precedent indicating that a trial judge may not credit a prosecutor's race-neutral justification if there is reason to believe that the race-neutral justification given for *another* juror was pretextual. For these reasons, the prosecutor's conduct vis-a-vis Juror 019 lends very little, if any, support to the majority's conclusion that the trial judge should have questioned the prosecutor's explanation for striking Juror 016.

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[6] For example, Juror 019's daughter's cocaine problem were more recent (two years) than was Juror 030's son's problem (six years). There may also have been significant differences in the demeanor of each prospective juror that are not evident from the trial transcript.

By way of contrast, compare the majority's conclusion that Jurors 019 and 030 are indistinguishable to its own discussion of the dissimilarity of Jurors 006 and 016, which is relegated to a footnote. In support of its claim that the prosecutor's alleged rationales for dismissing Juror 016 (her marital status and lack of community ties) were pretextual, even though Juror 006 was also dismissed on the same grounds, the majority summarily concludes that "[t]he record reveals . . . that Jurors 006 and 016 had very different backgrounds and thus did not possess 'comparable characteristics,' " even though Jurors 006 and 016 "were both single, no ties."

Finally, the majority contends that the prosecutor's explanation that Juror 016 was a youthful single person, and therefore potentially too tolerant, was not credible. Noting that Juror 016 "believed possession of crack cocaine should be illegal," the majority concludes that the prosecutor's concern that Juror 016 might be too tolerant for this three strikes case was "patently frivolous." The majority's conclusion is simply untenable — the theory that young persons, even those who believe crack cocaine should be illegal and don't expressly indicate any heightened tolerance for drug offenders, may be less willing to impose harsh sentences for drug possession than their older counterparts in the venire can hardly be considered unreasonable, much less "implausible or fantastic."

Indeed, the majority's own analysis demonstrates precisely why the Court of Appeal properly deferred to the trial court's judgment. The majority strains to find that the credibility issues discussed above constitute "clear and convincing" evidence which not only undermines the prosecutor's credibility, but makes clear that the prosecutor's articulated rationales for her peremptories were "wholly implausible." Viewing the majority's credibility argument generously, however, their conclusion is merely that the trial court had several potential reasons to question the prosecutor's credibility. Presumably, the trial court also had a variety of potential reasons to believe that the prosecutor *was* credible, including the prosecutor's ostensibly truthful comparison between Juror 016 and Juror 006. Significantly, the trial judge also had the ability to observe the prosecutor's demeanor to determine whether she appeared to be telling the truth, evidence which would not be evident in the record. Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications. *See Hernandez*, 500 U.S. at 369 ("Where there are two permissible views of the evidence, the

fact-finder's choice between them cannot be clearly erroneous."). *See also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (stating that Section 2254 "demands that state court decisions be given the benefit of the doubt").

For the foregoing reasons, I would affirm.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
PLAINTIFF-RESPONDENT,	)	SUPERIOR COURT
	)	NO. YA028034
VS.	)	
	)	
STEVEN MARTELL COLLINS,	)	
DEFENDANT-APPELLANT.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HON. ANDREW C. KAUFFMAN, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, STE. 5001
LOS ANGELES, CALIFORNIA 90013

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

VOLUME 1 OF 1 HERBERT CANNON, CSR #1923
OFFICIAL REPORTER

PAGES 1 - 266, INCL.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT
SW "L" HON. ANDREW C. KAUFFMAN, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
PLAINTIFF,	)	NO. YA028034
VS.	)	
STEVEN MARTELL COLLINS,	)	
DEFENDANT.	)	

REPORTER'S TRANSCRIPT ON APPEAL

MAY 28; AUGUST 26, 27, 28, 29; OCTOBER 2, 10, 1996

APPEARANCES:

FOR THE PEOPLE: GIL GARCETTI, DISTRICT ATTORNEY
BY: GINA SATRIANO, DEPUTY
825 SOUTH MAPLE AVENUE
TORRANCE, CALIFORNIA 90503

FOR THE DEFENDANT: MICHAEL P. JUDGE, PUBLID DEFENDER
BY: MARY NACHMAN, DEPUTY
825 SOUTH MAPLE AVENUE
TORRANCE, CALIFORNIA 90503

HERBERT CANNON, CSR #1923
OFFICIAL REPORTER

[3]

TORRANCE, CALIFORNIA; MONDAY, AUGUST 26, 1996

2:10 P.M.

DEPARTMENT
SW "L" HON. ANDREW C. KAUFFMAN, JUDGE

(APPEARANCES AS HERETOFORE NOTED.)

(HERBERT CANNON, OFFICIAL REPORTER.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

. . . .

[6] GIVING ME ANY DETAILS, MS. NACHMAN, IS WHAT?

MS. NACHMAN: MR. COLLINS IS MAINTAINING THAT HE IS NOT GUILTY OF THE CHARGE.

THE COURT: THAT DOESN'T HELP ME A LOT, MS. NACHMAN.

MS. NACHMAN: HE SAYS HE DID NOT HAVE THE NARCOTICS ON HIM.

THE COURT: IS THIS A SO-CALLED THROW OR DROP CASE?

MS. NACHMAN: IT WAS A BOOKING SEARCH.

THE COURT: SO THE ALLEGATION IS THAT IT WAS SOMEHOW PLANTED ON MR. COLLINS OR THAT IT WAS ENTIRELY FABRICATED?

MS. NACHMAN: YOU CAN SAY THAT. HE IS CLAIMING IT WAS PLANTED.

MS. SATRIANO: DOES THE COURT ANTICIPATE GETTING INTO TESTIMONY TODAY, OR CAN I EXCUSE THE DEPUTY?

THE COURT: IT IS A THIRD-STRIKE CASE. I DOUBT IF WE'LL GET INTO ANY EVIDENCE TODAY.

MS. NACHMAN: I WILL NEED A MOMENT TO GET HIM SOME CLOTHING.

THE COURT: WE'LL BE IN RECESS UNTIL THE JURY ARRIVES.

(RECESS.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL:)

THE COURT: WOULD YOU ALL RISE, PLEASE?

[7] (THE PROSPECTIVE JURY PANEL WAS SWORN BY THE CLERK TO TRY THE CAUSE.)

THE CLERK: YOU MAY BE SEATED.

JUROR NO. 1, 001.

NO. 2, 002.

NO. 3, 003.

NO. 4, 004.

NO. 5, 005

NO. 6, 006.

NO. 7, 007.

NO. 8, 008.

NO. 9, 009.

NO. 10, 0010.

NO. 11, 0011.

NO. 12, 0012.

THE COURT: FOR THOSE OF YOU WHO ARE STILL IN THE AUDIENCE, I'M NOW GOING TO ASK A SERIES OF QUESTIONS OF THE JURORS WHO ARE NOW SITTING IN THE JURY BOX. I WILL ASK THAT YOU, PLEASE, LISTEN CAREFULLY TO ALL THE QUESTIONS THAT I ASK AS WELL AS TO ANY ANSWERS THAT THEY MAY GIVE SO THAT IF LATER ON YOUR NAME IS CALLED AND YOU ARE ASKED TO TAKE ONE OF THEIR PLACES, I WON'T HAVE TO START ALL OVER AGAIN AND ASK YOU ALL THE SAME QUESTIONS.

LADIES AND GENTLEMEN, THIS IS A FELONY CRIMINAL CASE THAT WE ARE ABOUT TO START ENTITLED THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS STEVEN MARTELL COLLINS AS DEFEDNANT.

[8] MR. COLLINS IS SITTING AT THE COUNSEL TABLE FARTHEST FROM YOU. AND HE IS

REPRESENTED IN THIS CASE BY MS. MARY NACHMAN.

THE PEOPLE IN THIS CASE ARE REPRESENTED BY DEPUTY DISTRICT ATTORNEY GINA SATRIANO.

IT IS CHARGED IN THE INFORMATION AS FOLLOWS:

THAT ON OR ABOUT THE 19TH OF MARCH OF THIS YEAR IN THIS COUNTY, THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE IN VIOLATION OF HEALTH AND SAFETY CODE SECTION 11350, SUBDIVISION A, A FELONY, WAS COMMITTED BY STEVEN MARTELL COLLINS WHO DID WILLFULLY, AND UNLAWFULLY HAVE IN HIS POSSESSION A CONTROLLED SUBSTANCE, TO WIT, ROCK COCAINE.

IT IS FURTHER ALLEGED PURSUANT TO PENAL CODE SECTIONS 1170.12, SUBDIVISION A THROUGH SUBDIVISION D AND SECTION 667 SUBDIVISION B THROUGH (I), THAT THE DEFENDANT STEVEN MARTELL COLLINS HAS SUFFERED THE FOLLOWING

PRIOR CONVICTIONS OF SERIOUS OR VIOLENT FELONIES, ROBBERY, IN VIOLATION OF SECTION 211 IN CASE NO. A199738 ON JANUARY 25TH OF 1982 IN THE SUPERIOR COURT OF THIS COUNTY; RAPE IN VIOLATION OF SECTION 261, SUBDIVISION (2) OF THE PENAL CODE ON THAT SAME DATE IN LOS ANGELES COUNTY AND FURTHER ALLEGED PURSUANT TO PENAL CODE SECTION 667.5 SUBDIVISION (B), THAT THE DEFENDANT STEVEN MARTELL COLLINS SUFFERED THE TWO PRIOR CONVICTIONS THAT I HAVE MENTIONED, ROBBERY AND RAPE, AND IN ADDITION ON THE 6TH OF SEPTEMBER OF 1983, IN THE SAN BERNARDINO SUPERIOR COURT WAS CONVICTED OF THE CRIME OF BEING AN EX-FELON IN POSSESSION OF A FIREARM IN VIOLATION OF PENAL SECTION 12021 OF THE PENAL CODE AND THAT A TERM WAS SERVED [9] AS DESCRIBED IN PENAL CODE SECTION 667.5 FOR SAID OFFENSES AND

THAT THE DEFENDANT DID NOT REMAIN FREE OF PRISON CUSTODY FOR AND DID COMMIT AN OFFENSE RESULTING IN A FELONY CONVICTION DURING THAT PERIOD OF FIVE YEARS SUBSEQUENT TO THE CONCLUSION OF SAID TERM.

TO THIS CHARGE, MR. COLLINS HAS ENTERED A PLEA OF NOT GUILTY. AND TO THE ALLEGATION THAT HE SUFFERED THE THREE PRIOR CONVICTIONS, HE HAS ENTERED A DENIAL. AND THAT IS THE REASON WE ARE ALL ASSEMBLED HERE AND ABOUT TO START THE TRIAL IN THIS CASE.

ASIDE FROM WHAT YOU HAVE JUST HEARD ME READ TO YOU, DO ANY OF YOU KNOW ANYTHING ABOUT THIS CASE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU KNOW MR. COLLINS?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU KNOW EITHER OF THE ATTORNEYS?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: IS THERE ANYTHING ABOUT THE NATURE OF [10] THE CHARGE, POSSESSION OF ROCK COCAINE IN AND OF ITSELF THAT MIGHT MAKE IT DIFFICULT FOR ANY OF YOU TO SERVE AS JURORS ON THIS KIND OF CASE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: NOW, BASED ON WHAT I HAVE BEEN TOLD ABOUT THE CASE BY THE LAWYERS, I WOULD EXPECT THIS CASE WOULD BE SUBMITTED TO THE JURY PROBABLY NO LATER THAN WEDNESDAY OF THIS WEEK. I, OBVIOUSLY, DON'T KNOW HOW LONG THE JURY WILL DELIBERATE ON THIS CASE, BUT I THINK IT IS SAFE TO SAY THIS CASE SHOULD BE ALL OVER WITH BY FRIDAY.

WOULD THAT PRESENT A HARDSHIP FOR ANY OF YOU?

PROSPECTIVE JUROR 001: YES. I WATCH MY KIDS AND I HAVE A BUSINESS CONFERENCE ON WEDNESDAY.

THE COURT: SO YOU ARE UNAVAILABLE ALL DAY WEDNESDAY?

PROSPECTIVE JUROR 001: YES.

THE COURT: WHO ELSE HAD THEIR HAND UP?

PROSPECTIVE JUROR 009: MY COMPANY ONLY PAYS FOR FIVE DAYS OF JURY DUTY. THEY EXPECT ME TO BE BACK TO WORK. I TAKE CARE OF THEIR WHOLE COMPUTER OPERATION THERE.

THE COURT: THIS IS YOUR FOURTH DAY?

PROSPECTIVE JUROR 009: YES.

THE COURT: COUNSEL, WILL YOU STIPULATE THAT 001 AND 009 MAY BE EXCUSED?

MS. SATRIANO: YES.

MS. NACHMAN: YES.

[11] THE COURT: YOU MAY BE EXCUSED.

011, DID YOU HAVE YOUR HAND UP?

PROSPECTIVE JUROR 011: I HAVE A DOCTOR'S APPOINTMENT.

THE COURT: HOW LONG DO YOU THINK THAT IS GOING TO TAKE?

PROSPECTIVE JUROR 011: MAYBE AN HOUR OR SO.

PROSPECTIVE JUROR 003: I HAVE AN APPOINTMENT ON FRIDAY.

THE COURT: WHAT TIME IS YOUR APPOINTMENT?

PROSPECTIVE JUROR 003: 10:00.

THE COURT: IS IT ALSO GOING TO TAKE ABOUT AN HOUR?

PROSPECTIVE JUROR 003: YES.

THE COURT: REMIND ME. WE CAN WORK AROUND THAT.

ANYBODY ELSE?

THE CLERK WILL, PLEASE, CALL A COUPLE OF MORE NAMES.

THE CLERK: 013.

014.

THE COURT: GOOD AFTERNOON, 013. GOOD AFTERNOON, 014.

WERE YOU ABLE TO HEAR ME READ THE CHARGE IN THIS CASE, 013?

PROSPECTIVE JUROR 013: YES.

THE COURT: HOW ABOUT YOU, 014?

PROSPECTIVE JUROR 014: YES.

THE COURT: IS THERE ANYTHING ABOUT THE NATURE OF THE CHARGES IN THIS CASE THAT MIGHT MAKE IT DIFFICULT FOR [12] YOU TO SERVE ON THIS CASE, 013?

PROSPECTIVE JUROR 013: I DON'T THINK SO.

THE COURT: IS THERE ANY QUESTION IN YOUR MIND?

PROSPECTIVE JUROR 013: YES.

THE COURT: WOULD YOU TELL ME, PLEASE, WHY YOU HAVE THAT QUESTION IN YOUR MIND?

PROSPECTIVE JUROR 013: I JUST HAVE VERY BAD FEELINGS ABOUT THIS COURTHOUSE.

THE COURT: ABOUT THIS COURTHOUSE?

DOES IT HAVE ANYTHING TO DO WITH THE LUXURIOUS JURY ASSEMBLY ROOM?

PROSPECTIVE JUROR 013: NO, NO. I AM DISCONTENT, I THINK, WITH SOME OF THE JUDGES; NOT YOU, BUT SOME OF THE JUDGES IN THIS COURTHOUSE. I HAVE BAD FEELINGS ABOUT THIS. IT HAS NOTHING TO DO WITH THIS CASE.

THE COURT: WELL, DO YOU THINK THAT YOU COULD SET THOSE GENERALIZED FEELINGS THAT YOU MIGHT HAVE ASIDE LONG ENOUGH TO OBJECTIVELY EVALUATE THIS CASE?

PROSPECTIVE JUROR 013: I THINK SO. I THINK SO.

THE COURT: WELL, I HAVE TO TELL YOU, FRANKLY, MS. 013, WHEN YOU ANSWER QUESTIONS BY SAYING I THINK SO OR I HOPE SO --

PROSPECTIVE JUROR 013: I CAN.

THE COURT: IS THAT A TRUTHFUL ANSWER?

PROSPECTIVE JUROR 013: YES. YES, I CAN.

THE COURT: WHAT ABOUT YOU, 014?

PROSPECTIVE JUROR 014: EVERYTHING IS FINE.

THE COURT: DO YOU KNOW ANY OF THE PEOPLE THAT HAVE [13] BEEN INTRODUCED AT COUNSEL TABLE, MS. 013?

PROSPECTIVE JUROR 013: NO.

THE COURT: DO YOU, 014?

PROSPECTIVE JUROR 014: NO.

THE COURT: DO YOU THINK YOU WOULD HAVE A PROBLEM STAYING WITH US TO THE END OF THE WEEK IF NECESSARY, 013?

PROSPECTIVE JUROR 013: NO.

THE COURT: 014?

PROSPECTIVE JUROR 014: NO.

THE COURT: THAT BRINGS YOU TO WHERE EVERYONE ELSE IS.

BOTH SIDES OF THIS CASE ARE ENTITLED TO HAVE THE CASE HEARD AND DECIDED BY A FAIR,

IMPARTIAL, UNBIASED AND UNPREJUDICED JURY, ONE THAT WILL CONSCIENTIOUSLY WEIGH ALL THE EVIDENCE THAT IS PRESENTED AND APPLY THE LAW AND ARRIVE AT A JUST VERDICT REGARDLESS OF WHAT THE CONSEQUENCES OF THAT VERDICT MIGHT BE TO EITHER SIDE.

IF AT ANY POINT DURING THE COURSE OF THIS JURY INSTRUCTION PROCESS, IT OCCURS TO YOU FOR ANY REASON THAT YOU WOULD HAVE DIFFICULTY SERVING IN THAT CAPACITY, IT WOULD BE YOUR OBLIGATION TO MAKE THAT FACT KNOWN TO US.

MAY I, PLEASE, HAVE YOUR ASSURANCE THAT YOU WILL DO SO?

AS YOU KNOW FROM READING YOUR JUROR'S HANDBOOK OR FROM ANY PREVIOUS EXPERIENCE YOU MIGHT HAVE SITTING AS A JUROR ON CRIMINAL CASES, AS MR. COLLINS SITS AT COUNSEL TABLE HE

IS PRESUMED BY LAW TO BE INNOCENT OF THIS CHARGE. THAT DOES PLACE THE RESPONSIBILITY OR BURDEN OF PROVING HIM GUILTY [14] ON THE DISTRICT ATTORNEY. UNLESS AND UNTIL THE DISTRICT ATTORNEY CAN PRESENT SUCH EVIDENCE TO YOU TO CONVINCE YOU BEYOND A REASONABLE DOUBT THAT MR. COLLINS IS GUILTY OF THIS CHARGE, THE PRESUMPTION OF INNOCENCE PREVAILS AND YOU WOULD BE REQUIRED TO RETURN A VERDICT OF NOT GUILTY.

SO IF I WERE TO SURPRISE YOU ALL RIGHT NOW AND ASK YOU TO STEP INTO THE JURY ROOM, DELIBERATE ON THIS CASE AND COME BACK OUT INTO THE COURTROOM WITH A VERDICT, YOU WOULD HAVE NO ALTERNATIVE BUT TO COME BACK WITH A VERDICT OF NOT GUILTY BECAUSE YOU HAVE HEARD NOTHING FROM THE DISTRICT

ATTORNEY TO OVERCOME THE PRESUMPTION OF INNOCENCE.

DO YOU ALL UNDERSTAND THAT?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: THE FACT THAT MR. COLLINS MIGHT HAVE BEEN ARRESTED BY THE POLICE, THE FACT THAT SOMEBODY AT THE DISTRICT ATTORNEY'S OFFICE WAS ABLE TO GET A WORD PROCESSOR TO GENERATE A PIECE OF PAPER THAT HAS MR. COLLINS' NAME ON IT, THE FACT THAT HE IS HERE TODAY IN COURT, NONE OF THOSE FACTS ARE EVIDENCE OF HIS GUILT AND YOU ARE NOT TO INFER OR ASSUME FROM ANY OR ALL OF THOSE THAT HE IS MORE LIKELY TO BE GUILTY THAN INNOCENT.

WHEN I USE THE TERM EVIDENCE, I AM TALKING ABOUT THE TESTIMONY OF WITNESSES FROM THIS WITNESS STAND UNDER OATH, WRITINGS, MATERIAL OBJECTS OR ANYTHING THAT IS PRESENTED TO YOUR SENSES AND OFFERED TO PROVE THE EXISTENCE OR NONEXISTENCE [15] OF A FACT.

NOW, DO YOU ALL THINK THAT YOU UNDERSTAND THE CONCEPT -- DO YOU THINK YOU UNDERSTAND WHAT I AM TALKING ABOUT IF I USE THE TERM "EVIDENCE"?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: NOW, AS I INDICATED TO YOU, THE ENTIRE RESPONSIBILITY OF PRESENTING THAT EVIDENCE TO YOU IS ON THE DISTRICT ATTORNEY. NOW, SINCE THAT IS SO AND SINCE MR. COLLINS

DOES START OUT BEING PRESUMED INNOCENT, HE HAS NO OBLIGATION TO PROVE ANYTHING TO YOU AT ALL. HE NEED NOT CALL A SINGLE WITNESS TO THE WITNESS STAND; HE NEED NOT OFFER A SINGLE ITEM OF PHYSICAL EVIDENCE FOR YOU TO LOOK AT; HE NEED NOT TAKE THE WITNESS STAND HIMSELF TO TESTIFY IN HIS OWN BEHALF.

I DON'T KNOW WHETHER MR. COLLINS WILL CHOOSE TO TESTIFY IN THIS CASE OR NOT. IF HE DECIDES NOT TO TESTIFY, YOU MUST NOT IN ANY WAY HOLD THAT AGAINST HIM BECAUSE THAT IS HIS ABSOLUTE CONSTITUTIONAL RIGHT.

DO YOU UNDERSTAND THAT?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: YOU HEARD ME USE THE TERM BEYOND A REASONABLE DOUBT A FEW MINUTES AGO AS BEING THE STANDARD BY [16] WHICH YOU WILL HAVE TO EVALUATE THE EVIDENCE THAT YOU WILL HEAR IN THIS TRIAL. AND THE TERM REASONABLE DOUBT IS DEFINED AS FOLLOWS: IT IS NOT A MERE POSSIBLE DOUBT BECAUSE EVERYTHING RELATING TO HUMAN AFFAIRS IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. IT IS THAT STATE OF THE CASE WHICH, AFTER THE ENTIRE COMPARISON AND CONSIDERATION OF ALL OF THE EVIDENCE LEAVES YOUR MINDS IN THAT CONDITION THAT YOU CANNOT SAY YOU HAVE AN ABIDING CONVICTION OF THE TRUTH OF THE CHARGE.

NOW, DO YOU ALL THINK YOU UNDERSTAND THE CONCEPT OF PROOF BEYOND A REASONABLE DOUBT?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: ARE YOU WILLING TO USE THAT STANDARD AND ONLY THAT STANDARD TO EVALUATE THE EVIDENCE THAT YOU WILL HEAR DURING THE COURSE OF THIS TRIAL?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: NOW, IN DECIDING THIS CASE, YOU ARE GOING TO BE LIMITED TO THE EVIDENCE THAT IS PRESENTED DURING THE COURSE OF TRIAL IN THIS COURTROOM. NOW, WHAT THAT MEANS IS THAT YOU ARE NOT TO GO TO ANY LOCATION THAT MIGHT BE MENTIONED DURING THE COURSE OF THE TRIAL IF YOU CAN REASONABLY AVOID DOING SO.

YOU ARE NOT TO CONDUCT YOUR OWN INVESTIGATION; [17] YOU ARE NOT TO INTERVIEW YOUR OWN WITNESSES, CONSULT WITH RELATIVES, FRIENDS AND NEIGHBORS THAT YOU THINK MIGHT HAVE SOME GENERAL INFORMATION TO GIVE YOU ABOUT THE SUBJECT MATTER OF THE CASE.

AT NOON, YOU ARE NOT TO WALK ACROSS THE PARKING LOT TO THE TORRANCE LIBRARY AND LOOK THINGS UP IN DICTIONARIES, ENCYCLOPEDIAS OR OTHER REFERENCE WORKS.

THESE MIGHT SOUND LIKE OBVIOUS THINGS TO YOU, BUT JURORS HAVE DONE SOME OF THESE THINGS IN OTHER CASES.

DO YOU ALL UNDERSTAND YOU ARE NOT TO DO ANYTHING OF THAT SORT?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: AFTER ALL OF THE EVIDENCE HAS BEEN PRESENTED TO YOU, I WILL BE READING TO YOU A SET OF INSTRUCTIONS ON THE APPLICABLE LAW. YOU MUST ACCEPT AND APPLY THE LAW AS I STATE IT TO YOU WHETHER OR NOT YOU AGREE WITH IT.

BOTH SIDES OF THIS CASE HAVE PREPARED FOR THE CASE AND WILL PRESENT IT TO YOU BASED ON THE ASSUMPTION THAT YOU WILL ACCEPT AND APPLY THE LAW AS IT CURRENTLY EXISTS HERE IN THE STATE OF CALIFORNIA.

NOW, IT WOULD BE VERY UNFAIR FOR YOU, MORE THAN THAT, IT WOULD BE ABSOLUTELY IMPROPER FOR YOU TO DECIDE THIS CASE BASED NOT ON WHAT THE LAW IS, BUT ON WHAT YOU PERSONALLY THINK IT OUGHT TO BE.

I MUST HAVE YOUR ASSURANCE RIGHT NOW BEFORE WE [18] GO ANY FURTHER THAT YOU WILL

WITHOUT ANY RESERVATION WHATSOEVER FOLLOW THE LAW AS I STATE IT TO YOU.

MAY I HAVE THAT ASSURANCE, PLEASE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: NOW, I AM SURE THIS IS OBVIOUS TO YOU, LADIES AND GENTLEMEN, THAT THIS TRIAL IS NOT A POPULARITY CONTEST. YOU ARE NOT TO DECIDE THIS CASE BASED ON WHETHER OR NOT YOU THINK MR. COLLINS IS A NICE PERSON. YOU ARE NOT TO DECIDE THIS CASE BASED ON YOUR BELIEF AS TO ANYONE INVOLVED IN THIS CASE BEING A NICE PERSON; YOU ARE NOT TO DECIDE THE CASE BASED ON WHICH ATTORNEY YOU THINK DOES THE BEST JOB; YOU ARE NOT TO BE CONCERNED ABOUT HURTING ANYBODY'S FEELINGS; YOU ARE NOT TO

DECIDE THIS CASE BASED ON RACE, RELIGION, GENDER, NATIONAL ORIGIN OR SEXUAL ORIENTATION OF ANY OF THE ATTORNEYS, PARTIES, OR WITNESSES.

YOU ARE NOT HERE TO SEND A MESSAGE TO THE STREETS AND YOU ARE NOT HERE TO SEND A MESSAGE TO THE AUTHORITIES. YOU ARE NOT TO ALLOW SYMPATHY, PASSION, PREJUDICE, PUBLIC OPINION OR PUBLIC FEELING TO ENTER INTO YOUR DECISION-MAKING PROCESS IN ANY WAY. AND IF AFTER DUE DELIBERATION IN THE JURY ROOM, YOUR VERDICT IN THIS CASE IS TO BE GUILTY, YOU MUST NOT ALLOW THE SUBJECT OF PENALTY OR PUNISHMENT TO INFLUENCE THAT DECISION. THAT IS ALSO A MATTER WHICH MUST NOT IN ANY WAY AFFECT YOUR VERDICT.

DO YOU ALL UNDERSTAND THOSE THINGS AS WELL?

[19] (THE PROSPECTIVE JURY PANEL ANSWERED IN THE AFFIRMATIVE.)

THE COURT: NOW, WHAT WE ARE TRYING TO DO AT THIS STAGE OF THE PROCEEDINGS IS TO FIND 12 PEOPLE THAT CAN LISTEN CAREFULLY TO THE EVIDENCE, APPLY THE LAW OBJECTIVELY AND REACH A DECISION IN THE CASE, IF IT IS POSSIBLE TO DO SO; THIS BEING A CRIMINAL CASE, ANY DECISION THAT THE JURY ARRIVES AT WILL HAVE TO BE A UNANIMOUS ONE THAT IS JOINED IN BY ALL 12 JURORS. ON THE OTHER HAND, EACH OF THE 12 INDIVIDUAL JURORS IS GOING TO BE EXPECTED TO ARRIVE AT HIS OR HER OWN INDIVIDUAL EVALUATION OF THE EVIDENCE AND DECISION IN THE CASE.

NOW, DO ANY OF YOU, KNOWING YOURSELVES AS YOU DO AND KNOWING THAT THIS IS A GROUP

DECISION-MAKING PROCESS, THINK THAT YOU WILL BE UNABLE TO ARRIVE AT YOUR OWN INDEPENDENT DECISION?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: AFTER HAVING ARRIVED AT YOUR OWN INDEPENDENT DECISION YOU DISCOVER AT SOME POINT DURING THE JURY DELIBERATIONS THAT YOU ARE IN THE DISTINCT MINORITY WITH NINE, TEN, OR EVEN ELEVEN OF THE OTHER JURORS HAVING DECIDED THE CASE THE OTHER WAY, DO ANY OF YOU THINK YOU WOULD CHANGE YOUR MINDS JUST TO GO ALONG WITH THE WILL OF THE MAJORITY?

??

[20] (THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: BUT IF THE MAJORITY WERE ABLE TO CONVINCE YOU THAT YOUR INITIAL DECISION WAS WRONG, WOULD ANY OF YOU REFUSE TO CHANGE YOUR MINDS AS A MATTER OF PRIDE OR PRINCIPLE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: THERE ARE CERTAIN PEOPLE THAT ARE OF THE VIEW THAT ANYBODY THAT IS ARRESTED BY THE POLICE OR ACCUSED OF A CRIME IS AUTOMATICALLY GUILTY OF THAT CRIME AND THERE IS NO PURPOSE TO BE SERVED IN EVEN BOTHERING WITH A TRIAL.

DO ANY OF YOU FEEL THAT WAY?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: IF YOU ARE SATISFIED AFTER HEARING THE EVIDENCE IN THIS CASE THAT THE APPROPRIATE VERDICT IS NOT GUILTY, WILL ANY OF YOU HESITATE TO RETURN THAT VERDICT?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: IF YOU ARE SATISFIED AFTER HEARING THE [21] EVIDENCE THAT THE APPROPRIATE VERDICT IS GUILTY, WILL ANY OF HESITATE TO RETURN THAT VERDICT?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU HAVE ANY RELIGIOUS, PHILOSOPHICAL OR OTHER PERSONAL BELIEFS OF ANY KIND THAT WOULD MAKE IT EXTREMELY DIFFICULT FOR YOU OR EVEN IMPOSSIBLE FOR YOU TO ESSENTIALLY JUDGE THE PROPRIETY OF SOMEBODY ELSE'S CONDUCT?

MS. 011, DO YOU THINK YOU WOULD HAVE A PROBLEM DOING THAT?

PROSPECTIVE JUROR 011: YES.

THE COURT: THANK YOU, 011, FOR LETTING ME KNOW THAT. I WILL EXCUSE YOU.

THE CLERK: 015.

THE COURT: MS. 015, GOOD AFTERNOON.

DO YOU KNOW WHAT THE CHARGE IS IN THIS CASE?

PROSPECTIVE JUROR 015: YES.

THE COURT: IS THERE ANYTHING ABOUT THE NATURE OF THE CHARGE THAT MIGHT MAKE IT DIFFICULT FOR YOU TO SERVE ON THIS CASE?

PROSPECTIVE JUROR 015: NO.

THE COURT: WOULD YOU BE ABLE TO SERVE THROUGH THE END OF THE WEEK?

PROSPECTIVE JUROR 015: YES.

THE COURT: DO YOU KNOW ANY OF THE PEOPLE WHO HAVE [22] HAVE BEEN INTRODUCED AT COUNSEL TABLE?

PROSPECTIVE JUROR 015: NO.

THE COURT: WERE YOU ABLE TO FOLLOW THE DISCUSSIONS I HAD WITH THE OTHER JURORS WITH REGARD TO THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 015: YES.

THE COURT: WOULD YOU BE ABLE TO DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE

INSTRUCTIONS OF LAW WITHOUT REGRD TO ANY OF YOUR PERSONAL FEELINGS?

PROSPECTIVE JUROR 015: YES.

THE COURT: DO YOU THINK YOU WOULD BE ABLE TO DECIDE THIS CASE FOR YOURSELF?

PROSPECTIVE JUROR 015: YES.

THE COURT: ALL RIGHT. THAT PRETTY MUCH BRINGS YOU UP TO WHERE EVERYONE ELSE IS.

WHAT I WOULD LIKE TO HAVE ALL OF YOU DO, BEGINNING WITH 013, IS TO GIVE US THE INFORMATION REQUESTED THERE ON THE BOARD.

PROSPECTIVE JUROR 013: MY NAME IS 013. I LIVE IN REDONDO BEACH; MARRIED; SIX CHILDREN; HOUSEWIFE.

MY HUSBAND IS RETIRED.

I HAVE NO PREVIOUS EXPERIENCE WITH THE JURY.

THE COURT: WHAT DID YOUR HUSBAND DO BEFORE HE RETIRED?

PROSPECTIVE JUROR 013: HE WAS AN ENGINEER, SUPERVISORING ENGINEER FOR GENERAL TELEPHONE.

THE COURT: ARE ALL OF YOUR SIX CHILDREN WORKING?

PROSPECTIVE JUROR 013: YES -- WELL, YES. I WILL [23] SAY YES. ONE OF THEM IS STILL IN COLLEGE, BUT SHE WORKS.

THE COURT: LET'S TALK ABOUT THE OTHER FIVE, THEN.

PROSPECTIVE JUROR 013: THE OLDEST ONE LIVES IN TORRANCE, HAS A JOB.

THE COURT: I JUST NEED TO KNOW THE OCCUPATIONS.

PROSPECTIVE JUROR 013: HE WORKS DOWN AT THE DOCKS IN SAN PEDRO OR LONG BEACH, SAN PEDRO, I THINK IT IS.

THE COURT: IS HE A LONGSHOREMAN?

PROSPECTIVE JUROR 013: NO. HE DOES DISPATCHER.

THE NEXT IS A CARPENTER; LIVES IN ORANGE COUNTY.

THE NEXT IS A HOUSEWIFE AND MOTHER; LIVES IN NORTHERN CALIFORNIA.

THE NEXT IS AN UNDERWRITER FOR AN INSURANCE COMPANY.

THE COURT: IS THAT A SON OR DAUGHTER?

PROSPECTIVE JUROR 013: A SON WHO LIVES IN ORANGE COUNTY.

FIBER OPTICS -- THIS IS A SON; LIVES IN ORANGE COUNTY.

THE YOUNGEST ONE IS A DAUGHTER AND SHE IS WORKING TOWARD HER PH.D.

THE COURT: THAT IS THE ONE WHO IS STILL A STUDENT?

PROSPECTIVE JUROR 013: YES.

THE COURT: THANK YOU, MS. 013.

PROSPECTIVE JUROR 002: MY NAME IS 002. I LIVE IN TORRANCE. I AM MARRIED; NO CHILDREN.

I WORK FOR A SYSTEMS INTEGRATOR, PUTTING IN COMPUTER SYSTEMS. I USED TO BE A CIVIL ENGINEER.

[24] MY HUSBAND IS A COMMERCIAL LOAN OFFICER FOR A BANK.

I HAVE NO PRIOR JURY EXPERIENCE.

PROSPECTIVE JUROR 003: MY NAME IS 003. I LIVE IN HARBOR CITY. I AM MARRIED, ONE CHILD; RETIRED MILITARY.

MY WIFE IS AN AIRCRAFT MECHANIC.

MY DAUGHTER IS IN COLLEGE.

I HAVE NO PREVIOUS JURY EXPERIENCE.

THE COURT: WHAT BRANCH OF SERVICE WERE YOU IN?

PROSPECTIVE JUROR 003: ARMY.

THE COURT: THANK YOU, 003.

PROSPECTIVE JUROR 004: MY NAME IS 004. I RESIDE IN REDONDO BEACH; MARRIED; ONE CHILD.

I WORK AT TOYOTA.

MY HUSBAND IS A SERVICE MANAGER FOR PANASONIC.

PRIOR JURY EXPERIENCE, SEVEN YEARS AGO I SERVED ON A JURY.

THE COURT: HOW MANY DIFFERENT CASES DID YOU SERVE ON?

PROSPECTIVE JUROR 004: NONE. I SERVED MY TEN DAYS.

THE COURT: WERE YOU CALLED FORWARD TO SIT IN THE JURY BOX?

PROSPECTIVE JUROR 004: YES, I WAS.

THE COURT: SO FAR WE HAVEN'T MADE ANY PROGRESS OVER THE LAST TIME.

PROSPECTIVE JUROR 005: MY NAME IS 005. I LIVE IN TORRANCE. I AM MARRIED; ONE CHILD. I AM A BUYER-PLANNER FOR AN ELECTRONICS FIRM.

[25] MY HUSBAND IS A WASTE WATER OPERATOR IN THE CITY OF L.A.

I HAVE NO PREVIOUS JURY EXPERIENCE.

PROSPECTIVE JUROR 006: MY NAME IS 006. I LIVE IN TORRANCE. I AM SINGLE; NEVER EMPLOYED; NO PRIOR JURY EXPERIENCE.

PROSPECTIVE JUROR 007: MY NAME IS 007. I LIVE IN LOMITA. I AM MARRIED WITH TWO CHILDREN. I WORK IN A MEDICAL PEDIATRIC OFFICE.

MY HUSBAND WORKS FOR TRIPLE A.

I HAVE NO PRIOR JURY EXPERIENCE.

PROSPECTIVE JUROR 008: MY NAME IS 008. I LIVE IN REDONDO BEACH; NO CHILDREN. I AM AN ACCOUNTANT FOR A COMPUTER COMPANY AND I HAVE HAD PRIOR JURY EXPERIENCE, ONE CIVIL CASE AND ONE CRIMINAL CASE.

THE COURT: WHAT WAS THE CHARGE IN THE CRIMINAL CASE?

PROSPECTIVE JUROR 008: I BELIEVE IT WAS DUI.

THE COURT: WAS THE JURY IN THE CRIMINAL CASE ABLE TO REACH A VERDICT?

PROSPECTIVE JUROR 008: NO, IT WAS NOT.

THE COURT: HOW ABOUT IN THE CIVIL CASE?

PROSPECTIVE JUROR 008: I WAS AN ALTERNATE IN THAT CASE AND THEY DID REACH A VERDICT.

THE COURT: LET ME ASK YOU, MS. 008, IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU

THINK YOU COULD DECIDE THIS CASE COMPLETELY INDEPENDENTLY OF THOSE OTHER TWO CASES?

PROSPECTIVE JUROR 008: YES.

[26] PROSPECTIVE JUROR 014: MY NAME IS 014. I LIVE IN TORRANCE. I AM SEPARATED WITH TWO TEENAGED CHILDREN.

I WORK FOR QUANTAS AIRWAYS.

MY EX-HUSBAND IS A CONTRACTOR AND I HAVE NOT BEEN ON A JURY BEFORE.

PROSPECTIVE JUROR 010: MY NAME IS 010. I LIVE IN TORRANCE. I AM MARRIED WITH TWO YOUNG CHILDREN.

I AM AN AIR CONDITIONING TECHNICIAN FOR A DEPARTMENT STORE. MY WIFE IS A SECRETARY FOR A CHURCH.

PREVIOUS EXPERIENCE, CRIMINAL TWO YEARS AGO, ASSAULT AND BATTERY.

THE COURT: DID THE JURY REACH VERDICTS?

PROSPECTIVE JUROR 010: NO.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF THAT LAST CASE?

PROSPECTIVE JUROR 010: I DON'T KNOW. I HAD PRETTY BAD FEELINGS ON THE LAST CASE. I CAME AWAY FEELING PRETTY BAD.

THE COURT: BASED ON WHAT HAPPENED DURING JURY DELIBERATIONS?

PROSPECTIVE JUROR 010: THAT AND THE CASE. BOTH SIDES, THEY KIND OF, IT LOOKED LIKE THE POLICE DEPARTMENT WAS TRYING TO DO THINGS THAT REALLY WEREN'T TOO AWFULLY NICE, AND THE OTHER SIDE, THERE REALLY WAS NOT ENOUGH EVIDENCE, BUT YET, LOOKING AT THE EVIDENCE, IT SEEMED OBVIOUS THAT IT WAS THERE. SO I DON'T KNOW. IT WASN'T A NICE EXPERIENCE.

THE COURT: DO YOU THINK THAT THAT EXPERIENCE MIGHT [27] COLOR HOW YOU WOULD APPROACH YOUR DUTIES IN THIS CASE?

PROSPECTIVE JUROR 010: I DON'T KNOW. I REALLY WALKED AWAY FEELING THAT I REALLY DIDN'T CARE TO SERVE AGAIN ON A CASE. HONESTLY, I DON'T KNOW.

AFTER TWO YEARS, IT IS STILL ON MY MIND. I THINK ABOUT IT FROM TIME TO TIME.

THE COURT: WOULD YOU FEEL MORE COMFORTABLE NOT SERVING ON THIS CASE?

PROSPECTIVE JUROR 010: PROBABLY SO.

THE COURT: COUNSEL, DO YOU STIPULATE THAT MR. 010 MAY BE EXCUSED?

MS. SATRIANO: YES, SO STIPULATED.

MS. NACHMAN: SO STIPULATED.

THE COURT: THANK YOU, MR. 010, FOR LETTING US KNOW THAT.

YOU ARE EXCUSED.

PROSPECTIVE JUROR 015: MY NAME IS 015. THE AREA THAT I LIVE IN CURRENTLY IS MANHATTAN BEACH. I AM SINGLE. MY OCCUPATION IS FULL-TIME STUDENT AND OFFICE ASSISTANT. I HAVE NO SPOUSE AND NO PRIOR JURY DUTY.

PROSPECTIVE JUROR 012: MY NAME IS 012. I LIVE IN TORRANCE. I AM MARRIED. I HAVE FIVE CHILDREN, FOUR IN NORTH CAROLINA AND ONE HERE IN CALIFORNIA.

I WORK WITH TRW. I AM A SYSTEMS ENGINEER.

I WAS IN THE AIR FORCE FOR 28 YEARS.

MY WIFE IS A HOMEMAKER.

MY CHILDREN IN NORTH CAROLINA ARE INVOLVED IN ELECTRONICS. AND I HAVE NO PRIOR JURY EXPERIENCE.

[27-A] THE COURT: THANK YOU, 012.

LADIES AND GENTLEMEN, I HAVE SOME ADDITIONAL QUESTIONS TO ASK YOU NOW. SOME ARE OF A MORE PERSONAL NATURE. FOR THAT REASON, IF THERE IS ANY QUESTION THAT YOU WOULD PREFER NOT TO ANSWER IN OPEN COURT SO THAT EVERYONE ELSE CAN HEAR YOU AND YOU WOULD RATHER DO SO AT THE SIDE BAR TO MY LEFT IN THE PRESENCE OF ONLY THE TWO ATTORNEYS, THE COURT REPORTER AND MYSELF, YOU MAY DO SO; JUST INDICATE THAT THAT IS YOUR PREFERENCE AND I WILL ACCOMMODATE YOU.

HAVE ANY OF YOU YOURSELVES EVER BEEN ACCUSED OF THE CRIME OF POSSESSION OF ROCK COCAINE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: HAVE ANY OF YOU YOURSELVES EVER BEEN ACCUSED OF ANY CRIME OF ILLEGAL POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: HAVE ANY OF YOU YOURSELVES EVER USED ROCK COCAINE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

[28] THE COURT: DO ANY OF YOU HAVE ANY RELATIVES OR CLOSE FRIENDS WHO HAVE USED ROCK COCAINE OR BEEN ACCUSED OF ANY CRIME THAT INVOLVED THE POSSESSION OF COCAINE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU HAVE FRIENDS, RELATIVES THAT HAVE EVER BEEN ACCUSED OF ANY CRIME INVOLVING THE USE OF DRUGS OR DRUG PARAPHERNALIA?

003, WHAT IS YOUR RELATIONSHIP TO THIS PERSON?

PROSPECTIVE JUROR 003: COUSIN.

THE COURT: HOW MANY DIFFERENT PEOPLE ARE WE TALKING ABOUT?

PROSPECTIVE JUROR 003: THREE.

THE COURT: WHEN WAS THE MOST RECENT TIME THAT ONE OF YOUR THREE COUSINS WAS ACCUSED OF COMMITTING SUCH A CRIME?

PROSPECTIVE JUROR 003: ABOUT FIVE YEARS AGO.

THE COURT: HOW OLD WERE YOU COUSINS, APPROXIMATELY AT THE TIME THIS HAPPENED?

PROSPECTIVE JUROR 003: I WOULD SAY HE WAS ABOUT IN HIS EARLY TWENTIES.

THE COURT: DID THIS ALL HAPPEN WHILE YOU WERE STILL IN THE SERVICE?

PROSPECTIVE JUROR 003: YES.

THE COURT: SO YOU HEARD ABOUT IT THROUGH THE FAMILY GRAPEVINE?

PROSPECTIVE JUROR 003: YES.

[29] THE COURT: HOW CLOSE WERE YOU AT THE TIME TO YOUR COUSINS?

PROSPECTIVE JUROR 003: WE GREW UP TOGETHER.

THE COURT: DID YOU HAVE A CHANCE TO TALK TO ANY OF YOUR COUSINS ABOUT ANY OF THEIR PROBLEMS EITHER AT OR APPROXIMATELY THE TIME WE ARE TALKING ABOUT OR SINCE THEN?

PROSPECTIVE JUROR 003: I DON'T THINK SO.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT THE RELATIONSHIP THAT YOU HAD WITH YOUR COUSINS EITHER THEN OR NOW OR ANYTHING YOU KNOW ABOUT IT, WHAT THEY WENT THROUGH WITH THE DRUG PROBLEMS THEY HAD THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 003: NO.

THE COURT: YOU CAN PUT ALL OF THAT COMPLETELY ASIDE AND BE AS OBJECTIVE ABOUT THAT AS ANY OTHER JUROR?

PROSPECTIVE JUROR 003: YES.

THE COURT: ANYBODY ELSE?

PROSPECTIVE JUROR 004: MY FATHER.

THE COURT: WHAT WAS YOUR FATHER'S PROBLEM?

PROSPECTIVE JUROR 004: IT WAS HE WAS ARRESTED FOR DRUGS, BUT THIS WAS WHEN HE WAS YOUNGER.

THE COURT: SO THIS WAS BEFORE HE BECAME YOUR FATHER?

PROSPECTIVE JUROR 004: YES.

THE COURT: THIS WAS SOMETHING THAT YOU FOUND OUT ABOUT AS YOU WERE GROWING UP?

PROSPECTIVE JUROR 004: YES. MY DAD IS 30 YEARS A RECOVERED ALCOHOLIC AND DRUG ADDICT.

THE COURT: WE ARE GETTING AHEAD A LITTLE BIT. [30] WE'LL GET TO THAT NOW ANYWAY.

IS THERE ANYTHING ABOUT ANY OF THE EXPERIENCES THAT YOU MIGHT HAVE HAD WITH YOUR FATHER AS YOU WERE GROWING UP IN THAT REGARD THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 004: NO.

PROSPECTIVE JUROR 014: YOU ASKED A QUESTION EARLIER AND I DIDN'T HAVE A CHANCE TO RESPOND.

I THINK YOU ASKED IF I KNEW ANYBODY WHO HAS EVER USED COCAINE. WAS THAT THE QUESTION, OR WAS IT SOMEBODY WHO WAS ACCUSED OF USING IT?

THE COURT: YES, BEEN ACCUSED OF USING IT, POSSESSING IT.

PROSPECTIVE JUROR 014: NO. I DON'T KNOW ANYBODY WHO HAS BEEN ACCUSED OF USING IT.

THE COURT: I HAVE TO ASK THE VERY NEXT QUESTION, THEN, MS. 014: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS OR FRIENDS WHO TO YOUR KNOWLEDGE ARE USERS OF ROCK COCAINE?

PROSPECTIVE JUROR 014: I KNOW PEOPLE THAT HAVE USED IT, BUT THEY DON'T DO IT ANYMORE.

THE COURT: HAVE YOU EVER TALKED TO ANY OF THEM ABOUT THEIR EXPERIENCES AT THE TIME?

PROSPECTIVE JUROR 014: YOU KNOW, WE TALKED ABOUT IT. AND IT IS A REGRETABLE THING.

THE COURT: DO YOU THINK THERE IS ANYTHING THAT YOU HAVE LEARNED ABOUT THE EXPERIENCES OF THESE OTHER PEOPLE THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

[31] PROSPECTIVE JUROR 014: NO.

THE COURT: HAVE ANY OF YOU YOURSELVES EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

APART FROM 004, DO ANY OF YOU HAVE ANY FRIENDS OR CLOSE FRIENDS WHO HAVE HAD ANY PROBLEM WITH DRUG OR ALCOHOL ABUSE, TO YOUR KNOWLEDGE?

013, DID YOU HAVE YOUR HAND UP?

PROSPECTIVE JUROR 013: YES, I HAVE.

THE COURT: WHO WAS THE PERSON THAT YOU ARE THINKING OF?

PROSPECTIVE JUROR 013: MY FATHER WHEN I WAS GROWING UP. AND ONE OF MY SONS HAD A PROBLEM.

THE COURT: A PROBLEM BEING WHAT?

PROSPECTIVE JUROR 013: ALCOHOL.

THE COURT: BOTH PEOPLE?

PROSPECTIVE JUROR 013: YES.

THE COURT: DO YOU THINK THERE IS ANYTHING THAT -- WELL, AS FAR AS YOUR FATHER WAS CONCERNED, WAS THAT A PROBLEM THAT WAS GOING ON THROUGHOUT THE TIME YOU WERE GROWING UP?

PROSPECTIVE JUROR 013: YES.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR EXPERIENCES WITH YOUR FATHER AS

YOU WERE GROWING UP THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 013: NO.

THE COURT: WHAT ABOUT ANY EXPERIENCES THAT YOU MIGHT HAVE HAD WITH YOUR SON?

PROSPECTIVE JUROR 013: THAT MIGHT. I WOULD SAY YES.

[32] THE COURT: IS THERE A PROBLEM THAT IS STILL GOING ON, AS FAR AS YOU KNOW?

PROSPECTIVE JUROR 013: IT IS HARD TO SAY. IT IS HARD TO SAY BECAUSE I DON'T SEE HIM ALL THE TIME. WHEN I SEE HIM, HE IS FINE.

THE COUIRT: WAS THERE EVER A TIME WHEN HE WAS ACCUSED OF COMMITTING ANY CRIME WHILE BEING UNDER THE INFLUENCE OF ALCOHOL SUCH AS DRIVING UNDER THE INFLUENCE?

PROSPECTIVE JUROR 03: YES.

THE COURT: WAS THAT WHILE HE WAS STILL A JUVENILE, OR AFTERWARD?

PROSPECTIVE JUROR 013: BOTH.

THE COURT: DID YOU HAVE TO GO DOWN TO THE POLICE STATION AND BAIL HIM OUT?

PROSPECTIVE JUROR 013: YES.

THE COURT: HAVING ALL OF THESE THINGS IN MIND, DO YOU THINK THEY WOULD AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

LET ME CHANGE MY QUESTION A LITTLE BIT; DO YOU THINK THEY MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 013: YES, THEY COULD.

THE COURT: I'M GOING TO EXCUSE YOU, THEN, MS. 013. THANK YOU.

MS. 008, YOU HAD YOUR HAND UP?

PROSPECTIVE JUROR 008: YES. I HAVE TWO OLD FRIENDS WHO HAVE EITHER A DRUG OR ALCOHOL PROBLEM.

THE COURT: IS THIS A PROBLEM THAT IS STILL ONGOING AS FAR AS YOU KNOW?

[33] PROSPECTIVE JUROR 008: IN BOTH CASES, I DON'T KNOW. I KNOW ONE IS.

THE COURT: IS THERE ANYTHING ABOUT THE RELATIONSHIP THAT YOU HAVE WITH EITHER OF THESE PERSONS OR ANYTHING ABOUT WHAT THEY HAVE GONE THROUGH THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 008: I HAVE DOUBTS.

THE COURT: DO YOU THINK YOU WOULD BE ABLE TO PUT THOSE DOUBTS ASIDE LONG ENOUGH TO OBJECTIVELY EVALUATE THE EVIDENCE IN THIS CASE?

PROSPECTIVE JUROR 008: TO EVALUATE THE EVIDENCE, YES, I COULD.

THE COURT: THANK YOU.

006.

PROSPECTIVE JUROR 006: MY UNCLE IS A RECOVERED ALCOHOLIC FOR THREE YEARS NOW.

THE COURT: HAVE YOU EVER DISCUSSED WITH HIM ANY OF HIS EXPERIENCES IN THAT AREA?

PROSPECTIVE JUROR 006: I GUESS NOT, REALLY. HE HAS TOLD ME SOME OF THE THINGS, STUFF, THAT HAPPENED TO HIM; NOT REALLY ASKING QUESTIONS OR REALLY BRINGING IT UP.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT THE RELATIONSHIP THAT YOU HAVE WITH YOUR UNCLE OR ANYTHING THAT HE HAS TOLD YOU ABOUT HIS ALCOHOL PROBLEM THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 006: I DON'T THINK SO.

THE COURT: IS THERE ANY QUESTION IN YOUR MIND?

PROSPECTIVE JUROR 006: NO.

[34] PROSPECTIVE JUROR 012: I HAD A TEENAGED DAUGHTER WHO WAS INVOLVED WITH USING MARIJUANA AS A TEENAGER.

THE COURT: HOW LONG AGO?

PROSPECTIVE JUROR 012: WE ARE TALKING A LONG TIME AGO; IT WOULD NOT AFFECT MY ABILITY TO SERVE.

THE COURT: THANK YOU, 012.

DID I MISS ANYONE?

PROSPECTIVE JUROR 014: MY DAUGHTER TOO HAS TRIED MARIJUANA.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT THAT FACT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 014: NO.

THE COURT: DO ANY OF YOU HAVE ANY REASON TO BELIEVE THAT THERE IS DRUG DEALING GOING ON IN YOUR NEIGHBORHOOD?

008? WHAT HAVE YOU SEEN THAT LEADS YOU TO CONCLUDE THAT?

PROSPECTIVE JUROR 008: WELL, NEIGHBORS TOLD ME THAT THAT IS HAPPENING DOWN THE STREET FROM ME. AND YOU CAN HEAR PEOPLE SCREAMING AND YELLING LATE AT NIGHT FROM THAT AREA.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT THOSE FACTS THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE?

PROSPECTIVE JUROR 008: NO.

THE COURT: IS THERE ANYBODY ELSE?

IF YOU ARE SELECTED TO SERVE ON THIS CASE, ONE OF YOUR MOST IMPORTANT DUTIES WILL BE TO SERVE AS THE SOLE AND EXCLUSIVE JUDGES OF THE BELIEVABILITY OF ALL OF THE [35] WITNESSES THAT

ARE CALLED TO THE WITNESS STAND AS WELL AS DETERMINING THE WEIGHT AND SIGNIFICANCE TO BE GIVEN TO THAT TESTIMONY; I CAN TELL YOU THAT WE WILL BE HEARING IN THIS CASE FROM AT LEAST ONE POLICE OFFICER.

NOW, DO ANY OF YOU HAVE ANY TENDENCY TO GIVE THE TESTIMONY OF A POLICE OFFICER ANY GREATER WEIGHT OR SIGNIFICANCE THAN ANY OTHER PERSON JUST BECAUSE HE OR SHE IS A POLICE OFFICER?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU THINK THAT YOU WOULD HAVE THE OPPOSITE TENDENCY, THAT IS, TO GIVE SUCH TESTIMONY ANY LESSER WEIGHT OR

SIGNIFICANCE JUST BECAUSE HE OR SHE IS A POLICE OFFICER?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: HAVE ANY OF YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS SO POSITIVE OR SO NEGATIVE THAT YOU WOULD HAVE DIFFICULTY IN BEING OBJECTIVE IN EVALUATING THE TESTIMONY OF A POLICE OFFICER?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

[36] THE COURT: HAVE ANY OF YOU YOURSELVES EVER BEEN EMPLOYED AT ANY TIME IN THE PAST IN THE CAPACITY OF A LAW ENFORCEMENT AGENCY?

BY LAW ENFORCEMENT AGENCY, I AM INCLUDING POLICE DEPARTMENT, SHERIFF'S DEPARTMENT, MARSHAL'S OFFICE, HIGHWAY PATROL, STATE POLICE, MILITARY POLICE, DEPARTMENT OF CORRECTIONS, DEPARTMENT OF THE YOUTH AUTHORITY, PROBATION DEPARTMENT, DISTRICT ATTORNEY'S OFFICE, CITY ATTORNEY'S OFFICE, UNITED STATES ATTORNEY'S OFFICE, FEDERAL BUREAU OF INVESTIGATION, INTERNAL REVENUE SERVICE, SECRET SERVICE, SECURITY GUARD OF ANY NATURE, ANYTHING OF THAT SORT? IF SO, WOULD YOU RAISE YOUR HANDS, PLEASE.

002.

PROSPECTIVE JUROR 002: I WAS A COMMUNITY SERVICE OFFICER AT THE SCHOOL AND WE WOULD

WALK THE PEOPLE BACK AND FORTH BETWEEN THE DORMS AND THE CLASSES THROUGH THE POLICE DEPARTMENT.

THE COURT: OTHER THAN ESCORTING PEOPLE BACK AND FORTH FROM THE DORMS, DID YOU HAVE ANY OTHER RESPONSIBILITIES?

PROSPECTIVE JUROR 002: NO.

THE COURT: DID YOU WEAR ANY KIND OF UNIFORM?

PROSPECTIVE JUROR 002: A SHIRT.

THE COURT: WAS THERE ANYTHING ABOUT THAT EXPERIENCE THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE OR TO OBJECTIVELY EVALUATE THE TESTIMONY OF ANY POLICE OFFICERS THAT MIGHT TESTIFY?

PROSPECTIVE JUROR 002: NO.

PROSPECTIVE JUROR 012: I SERVED 20 YEARS AGO AS A [37] SPECIAL AGENT IN THE AIR FORCE SPECIAL INVESTIGATIONS.

THE COURT: IS THIS SOMETHING THAT YOU CAN TALK ABOUT?

PROSPECTIVE JUROR 012: IT IS EQUIVALENT TO THE FEDERAL BUREAU OF INVESTIGATION.

THE COURT: I TAKE IT FROM TIME TO TIME, YOU DID INVOLVE YOURSELF IN CRIMINAL INVESTIGATIONS?

PROSPECTIVE JUROR 012: I DID.

THE COURT: DID YOU EVER HAVE TO TESTIFY AS A WITNESS IN REGARD TO ANY OF YOUR INVESTIGATIONS?

PROSPECTIVE JUROR 012: YES.

THE COURT: MORE THAN ONCE?

PROSPECTIVE JUROR 012: TOTAL TIME, TWICE --I'M SORRY -- THREE TIMES.

THE COURT: DID YOU DEVELOP A CLOSE WORKING RELATIONSHIP WITH ANY OTHER FEDERAL LAW ENFORCEMENT AGENTS?

PROSPECTIVE JUROR 012: YES.

THE COURT: DO YOU THINK THERE WAS ANYTHING ABOUT ANY OF YOUR EXPERIENCES, MR. 012, THAT MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 012: NO.

THE COURT: TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE?

PROSPECTIVE JUROR 012: I WOULD BE FAIR AND IMPARTIAL.

THE COURT: MR. 003.

PROSPECTIVE JUROR 003: AS A SERGEANT IN EUROPE, I USED TO ESCORT PRISONERS.

[38] THE COURT: WERE YOU IN THE MILITARY POLICE?

PROSPECTIVE JUROR 003: NO. AS A SERGEANT, THAT IS ONE OF OUR DUTIES, TO ESCORT PRISONERS BACK AND FORTH TO THE PRISON, TO BRING THEM BACK TO THE CITY FOR TESTIMONY.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT ANY OF YOUR EXPERIENCES IN THAT REGARD THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 003: NO.

THE COURT: THANK YOU, 003.

DO ANY OF YOU HAVE ANY RELATIVES OR CLOSE FRIENDS THAT ARE NOW OR HAVE BEEN EMPLOYED IN ANY LAW ENFORCEMENT CAPACITY, AS FAR AS YOU KNOW?

PROSPECTIVE JUROR 007: I HAVE A FRIEND WHO IS A LONG BEACH POLICE OFFICER.

THE COURT: IS THIS A CLOSE FRIEND?

PROSPECTIVE JUROR 007: PRETTY CLOSE.

THE COURT: HAVE YOU EVER TALKED TO THIS FRIEND ABOUT ANY DUTIES OR EXPERIENCES?

PROSPECTIVE JUROR 007: NOT ON WHAT HE -- I JUST KNOW THAT HE IS A POLICE OFFICER. I DON'T KNOW WHAT HE REALLY, YOU KNOW, ABOUT WHAT HE DOES DURING THE DAY OR IN GENERAL WHAT HE DOES.

THE COURT: BUT DO YOU THINK THERE IS ANYTHING THAT THE TWO OF YOU TALKED ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 007: NO.

THE COURT: OR AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

[39] PROSPECTIVE JUROR 007: NO.

THE COURT: 014.

PROSPECTIVE JUROR 014: MY BROTHER USED TO BE A POLICEMAN FOR COSTA MESA. HE IS NO LONGER WITH THEM.

I ALSO KNOW A COUPLE OF ATTORNEYS, POLICE OFFICERS, AS FRIENDS.

THE COURT: HAVE YOU EVER TALKED TO ANY OF THESE PEOPLE ABOUT ANY OF THEIR PROFESSIONAL DUTIES OR RESPONSIBILITIES?

PROSPECTIVE JUROR 014: YES.

THE COURT: DO YOU THINK THERE IS ANYTHING THAT YOU HAVE TALKED TO THEM ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE OR THAT MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 014: NO.

THE COURT: NOW, POSSESSION OF DRUGS IS SOMETIMES REFERRED TO AS A VICTIMLESS CRIME; YOU ARE NOT GOING TO HEAR ANY TESTIMONY IN THIS CASE ABOUT ANYBODY BEING SHOT, STABBED; NOBODY HAD ANY PROPERTY TAKEN FROM THEM; AS A CONSEQUENCE, THERE ARE PEOPLE THAT ARE OF THE VIEW THAT AS FAR AS THIS TYPE OF CHARGE IS CONCERNED, THAT THIS TYPE OF CONDUCT REALLY SHOULD NOT BE AGAINST THE LAW; DO ANY OF YOU FEEL THAT WAY?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU THINK THAT THE POLICE ARE [40] WASTING THEIR TIME ENFORCING THIS TYPE OF LAW WHEN THEY HAVE MORE IMPORTANT THINGS TO DO?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: LET'S CALL TWO OTHER NAMES, PLEASE.

THE CLERK: JUROR NO. 1, 016.

JUROR NO. 10, 017.

THE COURT: GOOD AFTERNOON, MS. 016.

GOOD AFTERNOON, MS. 017.

MS. 016, HAVE YOU BEEN ABLE TO HEAR ALL OF THE QUESTIONS THAT I HAVE ASKED THUS FAR?

PROSPECTIVE JUROR 016: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME QUESTIONS I HAVE ASKED THE OTHER PROSPECTIVE JURORS OR SUBSTANTIALLY SIMILAR ONES, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THEM HAVE?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, 017?

PROSPECTIVE JUROR 017: NOT AS TO ANYTHING YOU HAVE ASKED SO FAR.

THE COURT: DO YOU KNOW ANYTHING ABOUT THIS CASE, MS. 016, OTHER THAN WHAT YOU HAVE PICKED UP FROM SITTING IN THE AUDIENCE TODAY?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, MS. 017?

PROSPECTIVE JUROR 017: NO.

[41] THE COURT: DO YOU KNOW ANYBODY THAT HAS BEEN IDENTIFIED AT COUNSEL TABLE, MS. 016?

PROSPECTIVE JUROR 016: NO.

THE COURT: 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: IS THERE ANYTHING ABOUT THE NATURE OF THE CHARGE OF POSSESSION OF ROCK COCAINE, MS. 016, THAT MIGHT MAKE IT DIFFICULT FOR YOU TO SIT ON THIS CASE?

PROSPECTIVE JUROR 016: NO.

THE COURT: 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: WOULD YOU BE ABLE TO STAY WITH US THROUGH THE END OF THE WEEK, 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: WOULD YOU BE ABLE TO DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

[42] THE COURT: MS. 016, WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 016: MY NAME IS 016. I LIVE IN INGLEWOOD. I AM SINGLE. I HAVE NO CHILDREN. I AM AN AUTOMATIONS CLERK FOR THE FEDERAL AVIATION ADMINISTRATION.

I HAVE NO PRIOR JURY EXPERIENCE.

PROSPECTIVE JUROR 017: MY NAME IS 017. I LIVE IN TORRANCE. I AM MARRIED. I HAVE TWO GROWN CHILDREN LIVING IN REDDING.

MY HUSBAND IS A RETIRED SHEET METAL MECHANIC AND I AM A HOUSEWIFE.

I HAVE BEEN ON TWO DRUNK DRIVING AND ONE MALPRACTICE SUIT.

THE COURT: AS FAR AS THE TWO DUI CASES WERE CONCERNED, WAS THE JURY ABLE TO REACH VERDICTS, MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF THOSE THREE OTHER CASES?

PROSPECTIVE JUROR 017: YES.

THE COURT: ARE YOUR TWO CHILDREN IN REDDING WORKING?

PROSPECTIVE JUROR 017: MY ONE SON IS A ROOF AND GUTTER CONTRACTOR. AND MY OTHER SON WORKS FOR HIM.

THE COURT: MS. 016, WITH REGARD TO THE VARIOUS QUESTIONS THAT I ASKED ABOUT DRUGS, AND DRUG USAGE, IS THERE ANYONE CLOSE TO YOU THAT HAS EVER BEEN ACCUSED OF COMMITTING

ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

[43] PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, 017?

PROSPECTIVE JUROR 017: I THINK MY OLDEST SON HAD A DRUNK DRIVING YEARS AGO.

THE COURT: DID HE EVER DISCUSS THE INCIDENT WITH YOU?

PROSPECTIVE JUROR 017: NO.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT MIGHT AFFECT YOU ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS IN YOUR NEIGHBORHOOD, MS. 016?

PROSPECTIVE JUROR 016: NO.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: DO YOU, MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: HAVE YOU YOURSELF OR ANYONE CLOSE TO YOU, MS. 016, THAT HAS EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 016: NO.

THE COURT: HOW ABOUT YOU, MS. 017?

PROSPECTIVE JUROR 017: OUTSIDE OF MY SON HAVING THAT ONE DUI, I DON'T THINK HE DRINKS NOW AND DRIVES.

THE COURT: MS. 016, HAVE YOU EVER BEEN EMPLOYED IN [44] LAW ENFORCEMENT?

PROSPECTIVE JUROR 016: NO.

THE COURT: HAS ANYONE CLOSE TO YOU?

PROSPECTIVE JUROR 016: NO.

THE COURT: MS. 017, HAVE YOU?

PROSPECTIVE JUROR 017: NO.

THE COURT: ANYONE CLOSE TO YOU THAT HAS?

PROSPECTIVE JUROR 017: NO.

THE COURT: AS FAR AS ALL 12 OF YOU ARE CONCERNED, LADIES AND GENTLEMEN, CAN ANY OF YOU THINK OF ANY REASON YOU COULD NOT BE FAIR AND IMPARTIAL JURORS IN THIS CASE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: COUNSEL, APPROACH THE BENCH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: MS. NACHMAN, DO YOU HAVE ANY ADDITIONAL QUESTIONS FOR CAUSE?

MS. NACHMAN: THE COURT DIDN'T MENTION WHETHER OR NOT THEY HAVE PRIORS, STARTING WITH MS. 001 UNTIL WE GOT TO MS. 004, OTHER PRIOR JURY EXPERIENCE. I THINK THEY WERE OVERLOOKING IT.

THE COURT: DO YOU OTHERWISE PASS FOR CAUSE?

MS NACHMAN: YES.

[45-46] THE COURT: MS. SATRIANO?

MS. SATRIANO: I WAS GOING TO ASK HAS ANYBODY BEEN ARRESTED FOR ANY CRIME OR HAVE ANY EXPERIENCE WITH LAW ENFORCEMENT GOOD OR BAD.

THE COURT: WELL, I ALREADY ASKED ABOUT EXPERIENCES WITH LAW ENFORCEMENT. I AM NOT

GOING TO ASK WHETHER THEY HAVE BEEN ARRESTED FOR ANYTHING.

MS. SATRIANO: I MEANT IN RELATION TO THE -- THEY HAVE BEEN ASKED ABOUT LAW ENFORCEMENT IN GENERAL OR JUST THAT THEY KNEW ANYBODY. I DIDN'T HEAR THE QUESTION.

THE COURT: I THINK I ASKED THAT.

ALL RIGHT.

MS. SATRIANO: I MISSED THAT.

I DON'T KNOW IF THE DISTINCTION BETWEEN CIVIL AND THE BURDEN OF PROOF, BECAUSE WE HAVE ONE LADY THAT HAS SERVED ON A CIVIL JURY.

THE COURT: WELL, DIDN'T I TALK TO THEM ABOUT THE BURDEN OF PROOF?

MS. SATRIANO: YES.

THE COURT: ANY OTHER QUESTIONS?

MS. SATRIANO: WERE THERE ANY OF THEM THAT HAVE BEEN VICTIMS OF CRIME AND WHAT KINDS OF EXPERIENCES THEY HAVE IN RELATION TO THAT?

THE COURT: I AM NOT GOING TO ASK THAT.

ARE THERE ANY OTHER QUESTIONS?

MS. SATRIANO: JUROR NO. 8 SAID THAT SHE HAD DOUBTS THAT SHE COULD BE IMPARTIAL AND YOU ASKED WHETHER SHE COULD LISTEN TO THE EVIDENCE. AFTER THAT, THAT WAS THE ONLY [47] FOLLOWUP QUESTION. I DON'T KNOW THAT SHE EXPLAINED WHY SHE HAD DOUBTS AS TO WHETHER SHE COULD BE IMPARTIAL.

MS. :NACHMAN: SHE DID SAY SHE COULD LISTEN TO THE EVIDENCE OBJECTIVELY.

THE COURT: I WILL NOT ASK ANY ADDITIONAL QUESTIONS OF MS. 008 IN THAT AREA.

DO YOU PASS FOR CAUSE?

MS. SATRIANO: PASS FOR CAUSE.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE JURY AS FOLLOWS:)

THE COURT: MS. 002, DID YOU TELL US WHETHER YOU HAD BEEN ON A JURY BEFORE?

PROSPECTIVE JUROR 002: YES, I DID.

I HAVE NEVER BEEN ON A JURY BEFORE.

THE COURT: MR. 003. WHAT ABOUT YOU?

PROSPECTIVE JUROR 003: NO.

THE COURT: THE FIRST PEREMPTORY CHALLENGE THEN IS WITH THE PEOPLE.

MS. SATRIANO: THANK AND EXCUSE JUROR NO. 8.

the court; 008, THANK YOU FOR YOUR SERVICE. YOU ARE EXCUSED.

THE CLERK: 018.

THE COURT: GOOD AFTERNOON, 018. HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 018: YES, I HAVE.

[48] THE COURT: IF I WERE TO ASK YOU THE SAME OR SUBSTANTIALLY SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 018: NO, I WOULDN'T.

THE COURT: AND CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 018: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION THERE ON THE BOARD?

PROSPECTIVE JUROR 018: MY NAME IS 018. I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH THREE GROWN CHILDREN.

I WAS FORMERLY A TEACHER; I AM NOW AT HOME.

MY HUSBAND IS A PHYSICIAN. HE IS THE HEAD OF THE TRAINING PROGRAM FOR INTERNS AND RESIDENTS.

I HAVE HAD NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 018: YES.

THE COURT: COULD YOU DECIDE THIS SOLELY ON THE EVIDENCE AND INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 018: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 018: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

[49] PROSPECTIVE JUROR 018: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 018: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 018: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 018: NO.

THE COURT: THANK YOU, 018.

MS. NACHMAN, DO YOU PASS FOR CAUSE AS TO 018?

MS. NACHMAN: YES, BUT I DON'T BELIEVE -- MAYBE I DIDN'T HEAR IT, WHAT HER GROWN CHILDREN DID.

PROSPECTIVE JUROR 018: OUR SON IS AN INTERN IN MEDICINE IN NORTHERN CALIFORNIA.

WE HAVE ONE DAUGHTER WHO IS LOOKING FOR A JOB AFTER GETTING HER MASTERS DEGREE AND THE THIRD ONE IS JUST GOING BACK TO SCHOOL TO GET A BS DEGREE IN COLORADO.

THE COURT: WHAT WAS IT THAT YOU FORMERLY TAUGHT?

PROSPECTIVE JUROR 018: ENGLISH.

THE COURT: AND AT THE JUNIOR HIGH SCHOOL OR HIGH SCHOOL LEVEL?

PROSPECTIVE JUROR 018: JUNIOR HIGH.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

[50] MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 12, YOUR HONOR.

THE COURT: THANK YOU, 012. YOU ARE EXCUSED.

THE CLERK: 019.

THE COURT: GOOD AFTERNOON, 019.

HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 019: YES.

THE COURT: IF I WAS TO ASK YOU THE SAME OR SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER THEM ANY DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 019: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 019: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 019: MY NAME IS 019. I LIVE IN INGLEWOOD. I AM SINGLE, RETIRED. I HAVE SEVEN KIDS.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: WHAT WAS YOUR OCCUPATION BEFORE YOU RETIRED?

PROSPECTIVE JUROR 019: A NURSE.

THE COURT: AND ARE YOUR CHILDREN WORKING?

PROSPECTIVE JUROR 019: YES.

THE COURT: CAN YOU GIVE US THEIR OCCUPATIONS, PLEASE?

PROSPECTIVE JUROR 019: THE OLDEST ONE IS A COMPUTER MANAGER FOR A COMPANY IN VAN NUYS.

ANOTHER ONE IS A CLINICAL SOCIAL WORKER, WORKS [51] FOR HERSELF NOW.

ONE SON HAS HIS OWN MECHANIC SHOP; ONE DOES NOT WORK. THE OTHER ONE IS IN ARIZONA WORKING FOR MCDONNELL DOUGLAS.

THE YOUNGEST IS AT HOME WITH FIVE KIDS.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 019: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 019: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUGS OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 019: MY YOUNGEST DAUGHTER HAD A PROBLEM WITH DRUGS.

THE COURT: WHAT KINDS OF DRUGS?

PROSPECTIVE JUROR 019: I HAVE NO IDEA.

THE COURT: HOW DID YOU FIND OUT ABOUT THE PROBLEM?

PROSPECTIVE JUROR 019: I WAS INVOLVED IN IT. I HAD TO HELP HER. SHE IS THE ONE WITH THE KIDS. I THINK IT WAS COCAINE.

THE COURT: WAS IT ROCK COCAINE?

PROSPECTIVE JUROR 019: NO.

THE COURT: HOW LONG AGO DID THAT HAPPEN?

PROSPECTIVE JUROR 019: SHE IS TWO YEARS CLEAN.

THE COURT: WAS THERE EVER A TIME WHEN SHE WAS ARRESTED AND ACCUSED OF COMMITTING SOME CRIME THAT INVOVLED [52] THE USE OF DRUGS?

PROSPECTIVE JUROR 019: NO, I DON'T THINK SO.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR DAUGHTER OR WHAT SHE HAS GONE THROUGH RECENTLY THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 019: NO, I DON'T THINK SO.

THE COURT: YOU CAN PUT THAT ASIDE AND BE AS OBJECTIVE AS ANY OTHER JURORS?

PROSPECTIVE JUROR 019: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 019: I HAVE NO REASON TO BELIEVE THAT.

THE COURT: THANK YOU, MS. 019.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO PLEASE THANK AND EXCUSE JUROR NO. 6.

THE COURT: THANK YOU, MR. 006. YOU ARE EXCUSED.

THE CLERK: 020.

THE COURT: GOOD AFTERNOON, 020. HAVE YOU HEARD THE QUESTIONS?

PROSPECTIVE JUROR 020: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME OR SIMILAR [53] QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY OF THEM DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 020: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 020: YES, I CAN.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 020: MY NAME IS 020. I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH TWO GROWN CHILDREN. I AM AN ACCOUNTANT.

I HAVE HAD NO MILITARY EXPERIENCE.

MY HUSBAND IS AN ENGINEER AND MY OLDEST DAUGHTER IS A MANAGER FOR TRW.

MY SON IS IN COLLEGE.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU THINK THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 020: YES, I DO.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 020: YES, I CAN.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 020: NO, I DON'T.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

[54] PROSPECTIVE JUROR 020: NO, I HAVEN'T.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUGS OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 020: NO, NOBODY HAS.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 020: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 020: YES.

THE COURT: THANK YOU, 020.

MKS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: MAY I HAVE A MOMENT?

THE COURT: YES.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 7.

THE COURT: THANK YOU, MS. 007 FOR YOUR SERVICE. YOU ARE EXCUSED.

THE CLERK: 021.

THE COURT: MS. 021, HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 021: YES, SIR.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS?

[55] PROSPECTIVE JUROR 021: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 021: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 021: MY NAME IS 021. I LIVE IN CARSON. I AM MARRIED WITH TWO SMALL CHILDREN. I AM A CUSTOMER SUPPORT SPECIALIST FOR A MAIL COMPANY.

MY HUSBAND WSA PREVIOUSLY IN THE AIR FORCE WORKING ON THE SPACE SHUTTLE. HE IS NOW AN ANALYST FOR A COMPANY THAT WORKS FOR THE DEPARTMENT OF DEFENSE.

I HAVE HAD A MURDER TRIAL AND A BURGLARY TRIAL.

THE COURT: WERE THE JURIES ABLE TO REACH VERDICTS?

PROSPECTIVE JUROR 021: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE

THIS CASE INDEPENDENTLY OF THOSE OTHER TWO CASES?

PROSPECTIVE JUROR 021: YES.

THE COURT: DO YOU HAVE ANY FRIENDS OR RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 021: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 021: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 021: MY IN-LAWS DO DRUGS. I DON'T KNOW IF THEY DO RECENTLY OR NOT. THEY

LIVE IN ANOTHER [56] STATE. THEY HAVE BEEN INVOLVED IN THAT.

THE COURT: WHAT TYPE OF DRUG IS THAT?

PROSPECTIVE JUROR 021: AS FAR AS I KNOW, IT IS MARIJUANA. THERE MAY BE MORE THAN THAT. I AM NOT SURE.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR IN-LAWS OR ANY OF THEIR HABITS THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE?

PROSPECTIVE JUROR 021: NO.

THE COURT: DO YOU THINK THE POSSESSION OF COCAINE OR ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 0021: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 021: NO.

THE COURT: THANK YOU, 021.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO PLEASE THANK AND EXCUSE JUROR 16.

THE COURT: THANK YOU, MS. 016. YOU ARE EXCUSED.

THE CLERK: 022.

THE COURT: GOOD AFTERNOON, 022.

HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 022: YES, I HAVE.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY [57] QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 022: YES. ABOUT A PARTICULAR LY POSITIVE OR PARTICULARLY NEGATIVE INCIDENT WITH A POLICE OFFICER, I THINK I HAVE HAD BOTH.

THE COURT: DO YOU THINK THAT ANY OF THOSE EXPERIENCES, BE THEY POSITIVE OR NEGATIVE, MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 022: NO, I DO NOT.

THE COURT: ARE THERE ANY QUESTIONS THAT YOU WOULD HAVE ANSWERED DIFFERENTLY?

PROSPECTIVE JUROR 022: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 022: YES, I CAN.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 022: MY NAME IS 022. I LIVE IN REDONDO BEACH. I AM DIVORCED, NO CHILDREN. I AM SELF-EMPLOYED IN THE READY-MIX CONCRETE BUSINESS.

MY EX IS UNEMPLOYED.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 022: NO, I DO NOT.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 022: YES, A COUSIN, BROTHER ALCOHOL.

[58] THE COURT: BOTH?

PROSPECTIVE JUROR 022: YES.

THE COURT: AS FAR AS YOU KNOW, HAVE THEY BEEN ACCUSED OF COMMITTING ANY CRIME AT A TIME WHEN THEY WERE UNDER THE INFLUENCE OF ALCOHOL?

PROSPECTIVE JUROR 022: NO, THEY HAVE NOT.

THE COURT: IS THERE ANYTHING ABOUT ANY OF YOUR EXPERIENCES WITH EITHER OF THEM OR YOUR RELATIONSHIP THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 022: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 022: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 022: NO.

THE COURT: THANK YOU, 022.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE 021.

THE COURT: THANK YOU FOR YOUR SERVICE, 021. YOU ARE EXCUSED.

THE CLERK: 023.

THE COURT: GOOD AFTERNOON, 023.

[59] HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 023: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTIONS DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 023: YES, YOUR HONOR.

I HAVE A PERSONAL FEELING ABOUT THE SUBJECT MATTER OF DRUGS THAT LEADS ME TO BELIEVE THAT I COULDN'T BE IMPARTIAL AS A JUROR IN THIS CASE.

THE COURT: I APPRECIATE YOUR LETTING US KNOW THAT, SIR.

YOU ARE EXCUSED.

THE CLERK: 024.

THE COURT: GOOD AFTERNOON, 024.

HAVE YOU HEARD THE QUESTIONS?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS?

PROSPECTIVE JUROR 024: YES.

I'M GOING OUT OF TOWN FOR A WEDDING THURSDAY NIGHT. SO I WILL NOT BE HERE FRIDAY.

THE COURT: WELL, WE ARE GOING TO TAKE AN ALTERNATE: SO IF WE HAVE TO, WE'LL JUST LET YOU GO.

ARE THERE ANY OTHER QUESTIONS THAT YOU WOULD HAVE ANSWERED DIFFERENTLY?

PROSPECTIVE JUROR 024: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 024: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON [60] THE BOARD?

PROSPECTIVE JUROR 024: MY NAME IS 024. I LIVE IN HERMOSA BEACH. I AM SINGLE; CURRENTLY I AM A HIGH SCHOOL TEACHER AND BEFORE THAT, I WORKED AS AN ACCOUNTANT AT A BIG ACCOUNTING FIRM AND I DO NOT HAVE ANY PRIOR JURY EXPERIENCE.

THE COURT: WHAT SUBJECT MATTER DO YOU TEACH?

PROSPECTIVE JUROR 024: HISTORY AND ECONOMICS NEXT YEAR.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 024: YES.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 024: NO.

THE COURT: HAVE YOU EVER HAD ANY EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 024: NO.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 024: NO.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OF OR POSSESSION OF DRUGS OR DRUG [61] PARAPHERNALIA?

PROSPECTIVE JUROR 024: NO.

THE COURT: DO YOU THINK THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE IS DRUG DEALING GOING ON IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 024: NO.

THE COURT: THANK YOU, 024.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: MAY WE APPROACH?

(THE FOLLOWING PROCEEDINGS WERE AT THE BENCH:)

MS. NACHMAN: I HAVE A CONCERN ABOUT MS. 024 HAVING TO LEAVE TOWN THURSDAY NIGHT FOR A WEDDING.

I WON'T BE AVAILABLE MYSELF UNTIL 10:30. ALSO I AM SUPPOSED TO BE DOWNTOWN AT CCB FOR A SENTENCING THURSDAY MORNING. IF NEED BE, I CAN GET THAT CONTINUED OR HAVE SOMEONE STAND IN FOR ME.

I'M WONDERING ABOUT THE TIME CRUNCH. I HAVE TO BE FINISHED WITH THIS TRIAL BY FRIDAY. SO THE FACT THAT SHE IS GOING TO BE OUT OF TOWN BOTHERS ME.

ALSO, ON 022 --

THE COURT: WELL, WAIT A MINUTE. YOU ALREADY PASSED FOR CAUSE ON MR. 022.

NOW, AS FAR AS 024 IS CONCERNED --

[62] MS. NACHMAN: CERTAINLY, IT MAY WELL BE THAT THEY MAY BE DELIBERATING AT THAT POINT. SHE SAYS SHE IS LEAVING TOWN.

THE COURT: DO YOU STIPULATE MS. 024 BE EXCUSED?

MS. SATRIANO: SO STIPULATED, YOUR HONOR.

MS. NACHMAN: SO STIPULATED, YOUR HONOR.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE COURT: MS. 024, OUT OF AN ABUNDANCE OF CAUTION, I AM GOING TO EXCUSE YOU.

THANK YOU.

THE CLERK: 025.

PROSPECTIVE JUROR 025: CAN I HAVE A SIDE BAR?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

PROSPECTIVE JUROR 025: MY WIFE IS APPARENTLY BEING TREATED FOR CRACK AND MY FAMILY IS COMPLETELY DESTROYED OVER THIS. I DON'T THINK I CAN BE IMPARTIAL.

THE COURT: I APPRECIATE YOUR LETTING US KNOW THAT.

THANK YOU.

[63] (THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF

THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE CLERK: 026.

THE COURT: GOOD AFTERNOON, MS. 026.

HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 026: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 026: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 026: MY NAME IS 026. I LIVE IN LOMITA. I AM MARRIED; TWO GROWN CHILDREN. ONE IS A NURSE IN BAKERSFIELD AT KAISER

HOSPITAL; THE OTHER ONE, MY SON, IS IN THE MUSIC BUSINESS. AND I WORKED FOR TRW. I HAVE BEEN RETIRED FOR 11 YEARS.

I HAVE HAD JURY EXPERIENCE.

THE COURT: HOW MANY DIFFERENT CRIMINAL CASES, IF ANY?

PROSPECTIVE JUROR 026: TWO.

THE COURT: AND THE CHARGES IN THOSE CASES?

PROSPECTIVE JUROR 026: ONE WAS AGAINST THE CITY OF INGLEWOOD, DRUGS. AND THE OTHER WAS DRUNK DRIVING.

THE COURT: WAS THE JURY IN EACH OF THOSE CASES ABLE [64] TO REACH A VERDICT?

PROSPECTIVE JUROR 026: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF ALL OF YOUR PREVIOUS JURY EXPERIENCES?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 026: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 026: NO.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 026: NOT TO MY KNOWLEDGE.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 026: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 026: NO.

THE COURT: MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

[65] THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES, YOUR HONOR. PASS FOR CAUSE.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO, PLEASE, THANK AND EXCUSE 019.

THE COURT: THANK YOU, MS. 019. FOR YOUR SERVICES. YOU ARE EXCUSED.

MS. NACHMAN: MAY WE APPROACH?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

(THE FOLLOWING PAGES, 66 THROUGH 72, ARE PROCEEDINGS HELD PURSUANT TO A WHEELER MOTION AND ORDERED SEALED BY THE COURT.)

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[73]

TORRANCE, CALIFORNIA; TUESDAY, AUGUST 27, 1996

2:00 P.M.

DEPARTMENT
SW "L" HON. ANDREW C. KAUFFMAN, JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL, MARY NACHMAN, DEPUTY PUBLIC DEFENDER OF LOS ANGELES COUNTY; GINA SATRIANO, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(HERBERT CANNON, OFFICIAL REPORTER.)

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE COURT: I KNOW I HAVE KEPT YOU WAITING NOW A LONG TIME. I APOLOGIZE FOR THAT . WE HAVE HAD SOME TACTICAL DIFFICULTIES WITH SOME OF THE FACILITIES OF THIS COURTROOM AND THE ADJACENT AREAS TODAY. WITHOUT GETTING INTO ANY OF THE DETAILS, SOME OF THE OTHER FACILITIESIN THIS BUILDING ARE CONSISTENT WITH THE FINE ELECTRONIC EQUIPMENT THAT YOU SAW DEMONSTRATED YESTERDAY AND ALSO CONSISTENT WITH THE LUXURIOUS SURROUNDINGS TO WHICH YOU HAVE BECOME ACCUSTOMED IN THE BASEMENT.

WE WERE ABOUT TO SEEK ANOTHER PROSPECTIVE JUROR.

LET'S DO THAT.

[74] THE CLERK: 027.

PROSPECTIVE JUROR 027: MAY I APPROACH THE BENCH?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

PROSPECTIVE JUROR 027: I HAVE PRIOR CONVICTIONS; I THINK IT WOULD BE ALMOST IMPOSSIBLE FOR ME TO BE FAIR AND IMPARTIAL.

THE COURT: ARE THOSE CONVICTIONS FOR DRUG-RELATED OFFENSES?

PROSPECTIVE JUROR 027: YES, THEY ARE.

THE COURT: THANK YOU, SIR, FOR LETTING US KNOW THAT.

YOU ARE EXCUSED.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL:)

THE CLERK: 028.

THE COURT: GOOD AFTERNOON, 028.

WERE YOU ABLE TO HEAR ALL THE QUESTIONS THAT WERE ASKED YESTERDAY?

PROSPECTIVE JUROR 028: YES.

THE COURT: IF I WERE TO ASK YOU THE SAME QUESTIONS THAT I ASKED THE OTHER PEOPLE OR SUBSTANTIALLY SIMILAR [75] QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER FOLKS HAVE?

PROSPECTIVE JUROR 028: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 028: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION THERE ON THE BOARD?

PROSPECTIVE JUROR 028: MY NAME IS 028.

I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH TWO CHILDREN. MY OCCUPATION, RETIRED; MY WIFE IS A HOUSEWIFE.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: WHAT WAS YOUR OCCUPATION BEFORE YOU RETIRED?

PROSPECTIVE JUROR 028: SALES MANAGER FOR A COMPUTER COMPANY.

THE COURT: ARE YOUR CHILDREN WORKING?

PROSPECTIVE JUROR 028: YES.

THE COURT: IN WHAT CAPACITY?

PROSPECTIVE JUROR 028: ONE IS IN THE HEALTH INDUSTRY AND THE OTHER ONE IS IN THE TRASH INDUSTRY.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 028: YES.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

[76] PROSPECTIVE JUROR 028: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 028: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 028: NO.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUIROR 028: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 028: NO.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 028: NO.

THE COURT: MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES, YOUR HONOR.

THE COURT: THE PEREMPTORY CHALLENGE IS WITH THE DEFENSE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE 014.

THE COURT: 014, THANK YOU, MA'AM, FOR YOUR SERVICE, YOU ARE EXCUSED.

[77] THE CLERK: 029.

THE COURT: GOOD AFTERNOON, 029.

HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 029: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY OF THE QUESTIONS DIFFERENTLY THAN MOST OF THE OTHER FOLKS HAVE?

PROSPECTIVE JUROR 029: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 029: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 029: ONE QUESTION, YES, SIR. I HAVE FRIENDS WHO ARE POLICE OFFICERS AND I CONVERSE WITH THEM OFTEN.

THE COURT: WHICH AGENCY DO THEY WORK FOR?

PROSPECTIVE JUROR 029: L.A. COUNTY SHERIFF, LAPD.

THE COURT: YOU HAVE TALKED TO THEM FROM TIME TO TIME ABOUT THEIR PROFESSIONAL DUTIES AND EXPERIENCES?

PROSPECTIVE JUROR 029: YES. RIGHT. AND I GENERALLY MEET AN LAPD OFFICER APPROXIMATELY ONCE A MONTH. IT IS JOB RELATED.

I WORK FOR THE CITY OF LOS ANGELES AS A BUILDING INSPECTOR AND I OCCASIONALLY GO TO ABANDONED CRACK HOUSES WITH OFFICERS; WE GO THROUGH OTHER PLACES THAT ARE BEING USED TO DEAL IN.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT ANY OF THESE RELATIONSHIPS OR

EXPERIENCES THAT YOU HAVE HAD [78] ON THE JOB THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 029: I WOULD TRY TO BE FAIR, BUT I DON'T KNOW HOW IMPARTIAL I COULD BE.

THE COURT: I APPRECIATE YOUR LETTING US KNOW THAT.

YOU ARE EXCUSED, 029.

THE CLERK: 030.

THE COURT: MS. 030, GOOD AFTERNOON.

HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 030: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY OF THESE DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 030: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 030: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION, PLEASE, ON THE BOARD?

PROSPECTIVE JUROR 030: MY NAME IS 030. I LIVE IN RANCHO DOMINGUEZ. I AM MARRIED. I HAVE THREE GROWN CHILDREN. MY OCCUPATION IS SECRETARY.

MY HUSBAND'S OCCUPATION IS A TRUCK DRIVER.

I HAVE HAD ONE PREVIOUS JURY EXPERIENCE ABOUT 25 YEARS AGO.

THE COURT: ON WHAT TYPE OF CASE?

PROSPECTIVE JUROR 030: TRAFFIC.

THE COURT: WAS THE JURY ABLE TO REACH A VERDICT?

PROSPECTIVE JUROR 030: YES.

THE COURT: WOULD YOU SAY YOU HAVE A GOOD MEMORY OF [79] THAT CASE?

PROSPECTIVE JUROR 030: NO. I DON'T REMEMBER IT VERY MUCH.

THE COURT: YOU WOULDN'T HAVE ANY PROBLEM PUTTING IT COMPLETELY ASIDE?

PROSPECTIVE JUROR 030: NO, NO PROBLEM.

THE COURT: ARE YOUR CHILDREN WORKING?

PROSPECTIVE JUROR 030: YES.

THE COURT: IN WHAT CAPACITY?

PROSPECTIVE JUROR 030: MY DAUGHTER WORKS AT A GROCERY STORE.

MY OLDEST SON IS A MACHINIST LIVING IN TEXAS.

MY YOUNGER SON IS AN AUTO MECHANIC IN SACRAMENTO.

THE COURT: YOU DO FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 030: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 030: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 030: MY OLDEST SON.

THE COURT: WHAT WAS HIS PARTICULAR PROBLEM?

PROSPECTIVE JUROR 030: COCAINE.

THE COURT: IS THIS A PROBLEM THAT HE HAS SINCE COME TO TERMS WITH?

PROSPECTIVE JUROR 030: YES.

[80] THE COURT: FOR WHAT PERIOD OF TIME DID HE HAVE THIS PROBLEM?

PROSPECTIVE JUROR 030: FROM HIS LATE TEENS UNTIL HE WAS ABOUT 26.

HE WENT INTO A 30-DAY REHAB. HE HAS BEEN CLEAN SINCE.

THE COURT: DURING THE SIX OR SO YEARS THAT YOU HAVE INDICATED HE HAD THIS PROBLEM, WAS HE EVER ARRESTED OR CHARGED WITH ANY CRIME INVOLVING POSSESSION OF COCAINE?

PROSPECTIVE JUROR 030: NOT THAT I KNOW OF, NO.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR SON OR ANYTHING ABOUT WHAT HE WENT THROUGH DURING THE PERIOD OF TIME THAT WE ARE TALKING ABOUT THAT YOU THINK MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 030: NO.

THE COURT: YOU COULD BE AS OBJECTIVE ABOUT THIS AS ANY OTHER JURORS?

PROSPECTIVE JUROR 030: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 030: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER ON A PROFESSIONAL LEVEL THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 030: NO.

THE COURT: THANK YOU, MS. 030.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

[81] MS. NACHMAN: PASS FOR CAUSE.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO, PLEASE, THANK AND EXCUSE 022.

THE COURT: THANK YOU FOR YOUR SERVICE, 022. YOU ARE EXCUSED.

THE CLERK: 031.

THE COURT: GOOD AFTERNOON, 031.

SIR, HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 031: YES, I HAVE.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 031: NO, I DON'T.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 031: YES, I CAN.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 031: MY NAME IS 031. I LIVE IN MANHATTAN BEACH. I AM MARRIED, NO CHILDREN. I CURRENTLY WORK IN THE TELEVISION

INDUSTRY IN ACCOUNTING AND FINANCE AREA. PREVIOUS TO THAT, I WAS A PUBLIC ACCOUNTANT.

MY WIFE IS AN EMERGENCY ROOM NURSE.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF IN A CRIMINAL CASE?

[82] PROSPECTIVE JUROR 031: YES, I DO.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 031: YES, I COULD.

THE COURT: FOR HOW LONG HAVE YOUR WIFE WORKED IN THE EMERGENCY ROOM?

PROSPECTIVE JUROR 031: FIVE OR SIX YEARS.

THE COURT: HAS SHE EVER TALKED TO YOU ABOUT ANY PATIENTS OR CASES THAT SHE HAS HAD TO DEAL WITH?

PROSPECTIVE JUROR 031: YES, SHE HAS.

THE COURT: HAS SHE EVER DISCUSSED WITH YOU ANY PERSONS WHO ARE BELIEVED TO HAVE OVERDOSED ON DRUGS OR NARCOTICS?

PROSPECTIVE JUROR 031: YES, SHE HAS.

THE COURT: DO YOU THINK THERE IS ANYTHING THAT SHE HAS TOLD YOU ABOUT HER EXPERIENCES THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 031: NO, I DO NOT.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 031: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER ON A

PROFESSIONAL LEVEL THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 031: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

[83] PROSPECTIVE JUROR 031: YES.

THE COURT: THANK YOU, 031.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: MAY I HAVE A MOMENT?

THE COURT: YES.

MS. NACHMAN: THE DEFENSE WOULD ACCEPT THE PANEL AS PRESENTLY CONSTITUTED.

MS. SATRIANO: THE PEOPLE ACCEPT THE PANEL AS PRESENTLY CONSTITUTED.

THE CLERK: 032.

THE COURT: GOOD AFTERNOON, MS. 032. YOU ARE ON YOUR SECOND DAY OF JURY SERVICE; HAVE YOU HEARD YOUR JUROR'S HANDBOOK?

PROSPECTIVE JUROR 032: NO, I HAVEN'T, NO.

THE COURT: SOMETIMES I THINK I SHOULD ADVISE JURORS OF THEIR RIGHTS BEFORE I ASK THEM THAT QUESTION.

ARE YOU WONDERING WHY YOU HAVE BEEN ASKED TO COME FORWARD?

PROSPECTIVE JUROR 032: I KNOW I AM AN ALTERNATE.

THE COURT: YOU MAY BE.

ARE YOU FAMILIAR WITH THE DUTIES OF AN ALTERNATE JUROR?

PROSPECTIVE JUROR 032: I HAVE A CONCEPT OF WHAT THE JURY DUTIES ARE AND THAT WOULD BE TO LISTEN TO THE EVIDENCE [84] AND ONLY DELIBERATE IN THE EVENT THAT SOMETHING HAPPENS TO ONE OF THE 12 THAT WERE SEATED.

THE COURT: I GUESS YOU DON'T HAVE TO READ THAT HANDBOOK AT ALL.

ARE YOU WILLING TO SERVE IN THAT CAPACITY?

PROSPECTIVE JUROR 032: YES, I AM.

THE COURT: HAVE YOU HEARD THE QUESTIONS I HAVE ASKED THE OTHER JURORS?

PROSPECTIVE JUROR 032: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME GENERAL QUESTIONS, DO YOU THINK YOU WOULD

ANSWER ANY OF THOSE DIFFERENTLY THAN MOST OF THE OTHER JURORS DID?

PROSPECTIVE JUROR 032: NO, I WOULDN'T.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 032: YES, I CAN.

THE COURT: GIVE US THE ANSWERS TO THE QUESTIONS ON THE BOARD, PLEASE.

PROSPECTIVE JUROR 032: MY NAME IS 032. I RESIDE IN REDONDO BEACH. I AM MARRIED. I HAVE THREE CHILDREN. MY OCCUPATION IS A PRODUCT MANAGER FOR A DATA PROCESSING COMPANY.

MY HUSBAND IS A RESELLER OF LONG DISTANCE TELEPHONE SERVICE.

THE ONLY PRIOR JURY EXPERIENCE I HAD WAS JURY DUTY ON WHICH I SPENT TEN DAYS IN A LOVELY BASEMENT FACILITY HERE SEVERAL YEARS AGO.

I HAVE TWO OLDER CHILDREN THAT ARE WORKING. MY OLDEST SON HAS HIS OWN PAVING COMPANY. MY OTHER SONS WORK [85] FOR A FOOD SERVICE COMPANY.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF IN A CRIMINAL CASE?

PROSPECTIVE JUROR 032: I DO, YES.

THE COURT: IF YOU WOUND UP BEING ONE OF THE JURORS ACTUALLY DELIBERATING ON THIS CASE, COULD YOU DECIDE THE CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 032: YES, I COULD.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 032: NO, I DON'T .

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVEJ JUROR 032: NO, I HAVEN'T.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 032: YES, I DO.

THE COURT: HAVE YOU OR ANYBODY CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 032: NOT WITH DRUGS, BUT CERTAINLY WITH ALCOHOL.

THE COURT: YOU OR SOME OTHER PERSON?

PROSPECTIVE JUROR 032: FAMILY, RELATIVES.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT ANY OF THE EXPERIENCES THAT YOU HAVE

HAD WITH THEM OR ANYTHING [86] ABOUT THE RELATIONSHIP THAT YOU HAVE HAD WITH THEM THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 032: NO, I DON'T.

THE COURT: HAVE ANY OF THESE PEOPLE THAT YOU MENTIONED EVER BEEN ACCUSED OF COMMITTING ANY CRIME WHILE UNDER THE INFLUENCE OF ALCOHOL?

PROSPECTIVE JUROR 032: MY EX-HUSBAND WAS ARRESTED FOR DRUNK DRIVING.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR KNOWLEDGE OF THAT INCIDENT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 032: NO.

THE COURT: THANK YOU, MS. 032.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO. DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES, YOUR HONOR.

THE PEOPLE ACCEPT THE ALTERNATE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE MS. 032.

THE COURT: THANK YOU FOR YOUR SERVICES, MS. 032. YOU ARE EXCUSED.

THE CLERK: 033.

THE COURT: GOOD AFTERNOON, MS. 033.

ARE YOU WILLING TO SERVE AS AN ALTERNATE JUROR IN THIS CASE?

PROSPECTIVE JUROR 033: YES, I AM.

THE COURT: DID YOU HEAR ALL THE QUESTIONS THAT WERE [87] ASKED OF THE 12 REGULAR JURORS?

PROSPECTIVE JUROR 033: YES.

THE COURT: WOULD YOUR ANSWERS TO THOSE QUESTIONS BE ANY DIFFERENT THAN MOST OF THE OTHER JURORS HAVE GIVEN?

PROSPECTIVE JUROR 033: NO, THEY WOULDN'T.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 033: YES, I CAN.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 033: I LIVE IN HERMOSA BEACH. I AM DIVORCED. I HAVE ONE GROWN SON. I WORK AS AN INTERNATIONAL ADMINISTRATOR.

MY SON IS A SYSTEMS ENGINEER.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 033: YES, I DO.

THE COURT: IF YOU WOUND UP BEING ONE OF THE 12 JURORS DELIBERATING ON THIS CASE, WOULD YOU BE ABLE TO DECIDE THE CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 033: YES, I WOULD.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 033: MY NIECE HAS A SON WHO IS GOING TO BE A SHERIFF.

THE COURT: IS THIS SOMEBODY THAT YOU SEE YOURSELF [88] FREQUENTLY?

PROSPECTIVE JUROR 033: NO. I SEE HIM PROBABLY THREE TIMES IN FIVE YEARS.

THE COURT: HAS HE EVER TALKED TO YOU ABOUT ANY OF HIS PROFESSIONAL DUTIES OR EXPERIENCES?

PROSPECTIVE JUROR 033: NO.

THE COURT: DO YOU TIHNK THERE IS ANYTHING ABOUT WHAT YOU HAVE TALKED ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE?

PROSPECTIVE JUROR 033: NO.

THE COURT: OR TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 033: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 033: YES.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 033: NO.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 033: NO.

THE COURT: THANK YOU.

MS. NACHMAN: DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

[89] MS. SATRIANO: THE PEOPLE ACCEPT THE ALTERNATE.

THE COURT: IF YOU WILL ALL RISE, PLEASE.

(THE JURY WAS SWORN BY THE CLERK TO TRY THE CAUSE.)

THE COURT: THE BALANCE OF THE PANEL IS EXCUSED AND DIRECTED TO RETURN TO THE JURY ASSEMBLY ROOM.

THANK YOU FOR PARTICIPATING IN THIS PROCESS.

Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

(3)

No. 04-52

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, WARDEN, *Petitioner,*

v.

STEVEN MARTELL COLLINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does 28 U.S.C. § 2254 allow a federal habeas corpus court to reject the presumption of correctness for state-court fact-finding, and condemn a state-court adjudication as an unreasonable determination of the facts, where a rational fact-finder could have determined the facts as the state court did?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-52

BERTRAM RICE, WARDEN, *Petitioner,*

v.

STEVEN MARTELL COLLINS

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is reported as *Collins* v. *Rice*, 348 F.3d 1082 (9th Cir. 2003), modified and superseded on denial of rehearing, 365 F.3d 667 (9th Cir. 2004); it is reprinted in the Joint Appendix (JA) at pages 23 et seq. The judgment and order of the district court, and the magistrate's report and recommendation that the district court adopted, are unreported; each is reprinted in the appendix to the petition for writ of certiorari (App. to Cert. Pet.) at pages 91-107. The opinion of the California Court of Appeal is unpublished, and is reprinted in the appendix to the petition for writ of certiorari at pages 109-120.

JURISDICTION

The court of appeals filed its opinion and judgment on November 7, 2003; and it denied, on April 8, 2004, a timely petition for rehearing filed by petitioner Rice (the State). The

State filed a timely petition for writ of certiorari on July 7, 2004. This Court granted that petition on June 28, 2005, and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

* * * *

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In California in 1996, the police arrested respondent Steven Collins pursuant to a warrant and discovered .10 grams of rock cocaine in his possession. App. to Cert. Pet. 110. The State charged respondent, as a recidivist under California's Three Strikes Law, with felonious possession of the cocaine. JA 76-76.

2. At respondent's trial, the judge conducted voir dire of the prospective jurors. JA 70 et seq. "Juror 16," an African-American woman, responded to the judge's questions by stating

that she lived in Inglewood; that she was single and had no children; that she worked as a clerk for the federal government; that she had no reason to believe there were drug dealers active in her neighborhood; that she had no prior jury experience; that she understood the concepts of "presumption of innocence" and "burden of proof"; and that there was nothing about the nature of the case that would make it difficult for her to serve on the jury. JA 139-143. "Juror 19," another African-American woman, stated that she also lived in Inglewood; that she was a retired nurse; that she was single but had seven grown children, including a daughter who herself had five children; that she had no reason to believe there were drug dealers active in her neighborhood; that her daughter at one time had a problem with drugs and that she was involved in helping her, but that she had "no idea" what kind of drug was involved, although she thought it was cocaine; that she did not "think" her daughter had ever been arrested or accused of committing a drug offense; and that the fact of her daughter's drug experience would not affect her ability to be impartial as a juror. JA 155-160.

Later in the course of jury selection, the prosecutor exercised four peremptory challenges, the third against Juror 16 and the fourth against Juror 19. Relying on the California case of *People* v. *Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978), defense counsel objected that the prosecutor had impermissibly exercised the challenges against Jurors 16 and 19 on account of their race. In response, the prosecutor pointed out that she had excused "two white people and two African-American people" and stated that there still remained two "people of color, African-American type" in the jury box. Reporter's Transcript [RT], People v. Collins, Los Angeles Superior Court Case No. YA028034 [lodged under seal], 66 et seq.

Finding a "prima facie case," however, the judge asked the prosecutor to explain her reasons for the two challenges. RT 66. The prosecutor responded,

> Ms. 016 as well as Ms. 019 [sic] were both young and I was concerned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. [¶] She and Mr. 006 were both single, no ties.

RT 66-67. The prosecutor identified Juror 6 in this comparison as one of the white jurors she had challenged. RT 67. In voir dire, Juror 6 had stated, "I live in Torrance. I am single; never employed; no prior jury experience"; he also had reported that his uncle was a recovering alcoholic. JA 108, 126. Summing up on Juror 16, the prosecutor said, "That was the reason, the justification for excusing her, rather than her being an African-American." RT 67.

Focusing next on Juror 19, the prosecutor continued,

> 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

RT 67.

After pausing to excuse the prospective jurors from the courtroom, the judge resumed the hearing by asking the prosecutor whether she had any further reasons for the peremptory challenges. The prosecutor answered by noting that Jurors 16 and 19 were women and that respondent Collins was a man; and she again remarked that there remained in the jury box both a "male African-American" and a "second female juror that is of African-American color, black color." RT 68. "That is it, your Honor, at this point," the prosecutor said. *Id.* But she offered to supply the judge with "cases for those types

of challenges as being upheld in other courts, age and gender and inexperience with a certain subject area." *Id.* at 68-69.

In response to the prosecutor, defense counsel opined that Juror 19 was not required to have "a whole lot of clinical knowledge" about her daughter's drug problem and that she wisely had ensured that her daughter received help without getting "clinically involved" with the treatment. RT 69-70. Defense counsel further contended that the prosecutor, if dissatisfied with Juror 19's answers, should have asked the judge to ask the juror more questions. RT 70. As for Juror 16, defense counsel stated, "Certainly, the fact that Ms. 016 was young, I don't think the prosecutor can pick and choose jurors just by saying I want more male-female balance or I want more older people." RT 70. In addition, defense counsel disputed whether the "woman of color" remaining in the jury box was African-American. According to defense counsel, "two African-American jurors—and my client, for the record, is African-American—have been removed without any obvious valid reasons." *Id.*

The judge asked whether the prosecutor could cite any authority for the proposition that sex was a proper criterion for a peremptory challenge. RT 70. The prosecutor mentioned that "People v. Ortega" had spoken of "the jury being balanced between young and old and men and women."[1] *Id.* The judge responded that the United States Supreme Court had disallowed peremptory challenges based on a juror's sex. He then stated, "I don't see * * * that you are seeking to justify excusing people of one ethnicity because of their gender. That isn't going to cut it." RT 71. The prosecutor replied,

> I think I tied that into a lack of ties in the community for both of them; that was one factor that I considered, that is, the

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1. *People* v. *Ortega*, 156 Cal.App.3d 63, 202 Cal.Rptr. 657 (Cal Ct. of App. 1984), seemed to approve some peremptory challenges exercised on grounds other than race to promote a jury balanced in terms of sex and age.

> manner in which I stated that they could—that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

RT 71. After explaining, "I am not talking about youth versus age," the judge then ruled as follows:

> Evaluating the district attorney's stated justifications for the exercise of peremptory challenges against prospective jurors numbers 019 and 016, beginning with 019, the court is satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 019's experiences with a family member who had a drug problem. [¶] With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney; however, Ms. 016 was a youthful person, as was 006. And one or more of the prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016. [¶] So the motion under the *Wheeler* case is denied at this time; however, that is without prejudice to your ability to renew the same, [defense counsel], should you feel it appropriate to do so. [¶] Both parties are reminded that if the court does grant a *Wheeler* motion, the court is required to report its reasons to the State Bar of California.

RT 71-72.

Jury selection continued. JA 186. Respondent's lawyer and the prosecutor each exercised, without objection, one more peremptory challenge. Each side then accepted the jury. JA 191, 199. An alternate juror was chosen, with the prosecutor refraining from exercising any more challenges.[2/] JA 210-214.

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2. The racial composition of the jury selected at the start of trial is not fully apparent from the record. None of the prospective jurors identified themselves by race in the voir dire. But, judging from the comments of the prosecutor and defense counsel, it can be deduced that at least one or two (Jurors 3 and 20) were African-American. It appears that nine of the jurors were women, and that at least three were men: Jurors 2, 4, 5, 15, 17, 18, 20, 26, and 30, each gave answers identifying themselves as women or had been addressed by the trial judge with a female honorific; and Jurors 3, 28, and 31, had identified themselves as men. JA 101, 106-108, 142-143, 151-152, 161, 180, 188-189, 195, 199, 200-201. The record provides no direct evidence of the race or the sex of the alternate juror.

3. In the ensuing trial, the jury found respondent guilty as charged. App. to Cert. Pet. 109-110. The court sentenced him to imprisonment as a recidivist for twenty-five years to life. *Id.*

4. Respondent appealed, claiming that the trial judge had erred under *People* v. *Wheeler* and the federal constitutional rule of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—but only in overruling his objection to the prosecutor's challenge to Juror 16. Respondent argued that he had made out a prima facie case of a *Wheeler-Batson* violation on account of the prosecutor's challenge to two African-American jurors in a case involving an African-American defendant, and that the prosecutor impermissibly had excluded Juror 16 "based solely on her youthful age." App. to Cert. Pet. 190.

In a written opinion affirming the conviction, the California Court of Appeal upheld the trial judge's ruling on respondent's peremptory-challenge objection. App. to Cert. Pet. 109-120. The appellate court decided, first, that the prosecutor's reliance on a Juror 16's age as a ground for the challenge was permissible. *Id.* at 115-116. The court also ruled that, in any event, it was proper for the prosecutor to excuse Juror 16 based on her eye-rolling demeanor; and that, even though the trial judge had not witnessed the eye-rolling, it was proper for the judge to accept the prosecutor's description of the juror's demeanor as justifying the challenge. *Id.* at 116. The appellate court, further, rejected respondent's assertion that the trial judge had not engaged in a "sincere and reasoned" effort to evaluate the prosecutor's stated reasons. The court explained that

nothing in the record indicated that the judge had not approached his duty appropriately, and that the judge's conclusions therefore were entitled to "great deference on appeal." *Id.* at 116-117. The California Supreme Court declined to hear a further appeal. App. to Cert. Pet. 96.

5. Respondent then filed an application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the federal district court. Again, respondent limited his *Batson* claim to the argument that he had made out a prima facie case of racial discrimination, and that the prosecutor's reliance on Juror 16's youth for the strike was itself impermissible and therefore insufficient to overcome the objection. See App. to Cert. Pet. 101. In neither his petition nor in his traverse, nor elsewhere, did he proffer any evidence other than that in the state trial and appellate record. Cf. JA 4, 9. Adopting the report and recommendation of the federal magistrate, Judge Hatter concluded that the prosecutor's asserted justifications for the peremptory challenge of Juror 16—youth and demeanor—were race-neutral; and that respondent had failed to rebut—with "clear and convincing evidence" as required by 28 U.S.C. § 2254(e)(1)—the state trial court's finding that the prosecutor's two reasons were sincere. *Id.* at 101-105. Further ruling that the decisions of the state courts were neither "contrary to" nor "unreasonable applications of" clearly-established federal law under § 2254(d), the district court denied relief on respondent's *Batson* claim and dismissed the petition. *Id.* at 97, 105.

6. Respondent appealed to the Ninth Circuit Court of Appeals. He now argued that the prosecutor had challenged Juror 16 based on race, and that the prosecutor's cited reasons regarding youth, ties to the community, and demeanor were mere pretexts. Brief of Appellant, Collins v. Rice, Ninth Circuit Court of Appeals Case No. 01-56958, 29-37. In a two-to-one opinion authored by Judge Paez and joined by Judge Thomas, the Ninth Circuit reversed the district court judgment.

Saying that the prosecutor had equated Juror 16's youth with a lack of ties to the community and tolerance for drug use, the

majority criticized the state court for "glossing over" the prosecutor's "clarification" that her reason for the challenge; the majority said that the community-ties concern was unsupported by the record and did not "relate" to respondent's drug-possession case; and it concluded that, as there was "no evidence" that Juror 16 herself was tolerant of drug use, the prosecutor's reliance of drug tolerance was "contrary" to the evidence. JA 49-52. The majority also asserted that the prosecutor's failure to challenge Juror 15—said to be a single, white juror—on the same grounds indicated that her challenge to Juror 16 was a "pretext" for racial discrimination. JA 50. Conversely, the majority rejected the prosecutor's explanation that she indeed had challenged Juror 6—another single, white juror—for the same reasons. The majority asserted that Juror 6 was different from Juror 16 in other respects. JA 50 [at fn.10].

The panel further rejected as pretextual the prosecutor's stated reliance on Juror 16's demeanor. JA 53-56. It said that there was no corroboration of the prosecutor's report that Juror 16 had disdainfully rolled her eyes at a remark by the judge. JA 60. The majority also found the prosecutor not "credible" on this score because she assertedly had "attempted to offer," and then had "abandoned" reliance upon, the juror's sex as a justification for her challenge, and because the prosecutor at one point had referred to Juror 19 as young, even though that juror was retired and a grandmother. JA 55-56.

On this basis, the majority concluded that the state trial and appellate courts, in accepting the prosecutor's stated reasons for challenging Juror 16, had engaged in an "unreasonable application" of *Batson* under 28 U.S.C. § 2254(d)(1) and an "unreasonable determination of the facts" under § 2254(d)(2); that the state appellate court was "objectively unreasonable" in ruling that the trial court had not "clearly erred" in accepting the prosecutor's justifications as "race neutral"; that the state appellate court had "unreasonably" failed to "address" the evidence cited by the panel as revealing that the prosecutor's expressed reliance on the Juror 16's age was really a pretext for

racial discrimination; that the state appellate court had "unreasonably" determined the facts when it ruled that nothing in the record showed that the trial judge had failed to undertake a "searching inquiry" into the prosecutor's professed reasons for the challenges; and that the state appellate court had "unreasonably applied" *Batson* in ruling that the trial judge had fulfilled his "duty." JA 48-49, 52, 54, 56, 60, 61. In addition, the majority concluded that "clear and convincing evidence," as required by § 2254(e)(1), demonstrated: that there was "no basis" to dismiss Juror 16 on account of youth or demeanor; that the prosecutor's explanations were pretexts for challenging Jurors 16 and 19 on the basis of race; and that the state appellate court's ruling had been based on an "unreasonable determination" of the facts. JA 54, 56, 57, 58.

In dissent, Judge Hall criticized the majority for failing to defer to the state appellate court's reasonable conclusions as required under 28 U.S.C. § 2254. JA 62. In Judge Hall's view, the majority improperly had drawn unnecessary adverse inferences about the prosecutor's credibility without regard to the many reasons that supported the credibility determination of the state judge who had observed the prosecutor's demeanor. JA 62-63. Thus, Judge Hall rejected the majority's reliance on the prosecutor's statement about Juror 19's age, dismissing it as a slip of the tongue. JA 63-64. Her dissent also explained that, even if the prosecutor's reference to gender were arguably improper, the state judge had properly credited other valid reasons for the peremptory challenges. JA 64-65. Finally, Judge Hall characterized as untenable the majority's belief that it is "implausible or fantastic" to believe that young jurors might be less willing than their older counterparts to endorse harsh sentences for drug possession. JA 67.

7. The Ninth Circuit denied rehearing and hearing en banc. Judge Bea—joined by Judges Kleinfeld, Gould, Tallman, and Callahan—dissented from that denial. JA 29 et seq. In their view, the panel majority had failed to review the record with deference to the state court findings, and instead had

"nitpicked" the record and disregarded the evidence supporting the state-court findings. Addressing the prosecutor's description of Juror 19 as young, Judge Bea's dissent discerned that "it appears that everyone in that room knew that the prosecutor meant to compare Juror 016 to Juror 006." JA 30 [& fn. 2]. The dissent also criticized as "irrational" the panel majority's view that the prosecutor's statement about Juror 16's eye-rolling conduct could not be accepted unless the trial judge himself had observed it. All that mattered was whether the prosecutor was telling the truth; and the trial judge, who had observed her demeanor, was in the best position to discern that. JA 31.

The five-judge dissent criticized the two-to-one panel opinion for ignoring the "spirit, if not the letter" of § 2254(d). The panel had "substitute[d] its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court" and then improperly had "insist[ed] that any perspective other than its own must be unreasonable." JA 34.

SUMMARY OF ARGUMENT

The California courts accepted, as truthful, the permissible race-neutral reasons offered by the prosecutor for her peremptory challenge to African-American Juror 16 in compliance with *Batson* v. *Kentucky*. Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the state courts' resolution of that factual question was binding in the federal habeas corpus court and precluded relief on respondent's *Batson* claim. For the state-court determination was supported by substantial evidence so that a "rational" fact-finder could have rejected respondent's bare allegation that the prosecutor instead had challenged the juror on account of her race.

1. Even before AEDPA, Congress had left little room for federal courts to reject state judicial findings of historical fact, especially those based on the credibility of witnesses observed

by the state court. State-court fact determinations often were "presumed" to be correct, and a petitioner could overcome the presumption only by presenting "convincing" evidence that the state court's finding was wrong. Federal review of state-court findings was intended to be no more intrusive than the deferential review applied by federal appellate court to federal district-court findings. And, in the words of this Court, the federal courts had "no license" to re-determine the credibility of witnesses who had appeared only in the state court.

a. In AEDPA, Congress reformed habeas corpus to tighten the restrictions on the writ. Central to Congress' reforms, § 2254(d) and (e) enhanced the primary role of state courts in fact-finding and strengthened the preclusive effect of their fact determinations. Section 2254(d)(2), which presumptively bars relief on any claim rejected on the merits by the state court, prevents second-guessing the state-court's findings of the facts upon which the petitioner's claim depends, unless the state court's factual determinations were "unreasonable" in light of the evidence presented to it. As with this Court's interpretation of a similar objective "reasonableness" standard in § 2254(d)(1), the (d)(2) standard insulates state-court findings with even more protection than that afforded to comparable findings by federal trial courts. The more-forgiving standard of review for objective reasonableness comports with the standard that traditionally governs review of the sufficiency of the evidence in support of a verdict of guilt on the elements of a criminal offense. Under the (d)(2) standard, the habeas corpus court must defer to state-court fact findings if supported by "any substantial evidence" that would allow "any rational trier of fact" to decide the facts as the state court did.

b. Section 2254(e)(1) affords the state courts at least the same level of deference as (d)(2) in review of factual findings that are challenged purely on the basis of the extant state record. Strengthened by AEDPA, (e)(1) provides that state-court factual determinations now are automatically presumed correct in all cases. As the presumption no longer depends upon "fair

support" for the finding in the state record, a petitioner such as respondent cannot discharge his burden merely by second-guessing state-court fact determinations.

Instead, a petitioner now always bears the burden of rebutting the presumption with "clear and convincing"evidence. It will be a rare case in which a petitioner might meet this burden without presenting the federal court with new evidence. Nor may he meet his burden by relying on the state record if the state court findings are supported by substantial evidence so that a rational trier of fact could have found the facts the way the state court did. Where the state court adjudicated the petitioner's claim on the merits, relief on a petitioner's claim in such circumstances will be precluded under (d)(2). And it would be inherently contradictory to assert that a record which reasonable supports the state court's determinations nevertheless manifests "clear and convincing evidence" invalidating them. Separately and together, then, § 2254(d)(2) and (e)(1) provisions prohibit relief for claims based on a dispute about the facts arising solely from a state court record that rationally supported the state court's findings and resulting adjudication.

2. Here, the state court record provided the requisite rational support—and much more—for the state court's factual determination accepting as truthful the prosecutor's explanation that she had challenged Juror 16 for benign reasons. There was only the weakest of inferences of possible discrimination in the first place. The prosecutor merely had exercised two challenges against whites and two against African-Americans, and there was no "victim" of a race different from respondent's. The prosecutor's reason for challenging Juror 19—her naive statements about her daughter's drug use—were so obviously well-founded that respondent abandoned his objection to it in the state appeal long ago.

When asked to do so, the prosecutor readily provided reasons for challenging Juror 16: concerns related to the unmarried juror's youth and lack of community ties in a case involving a prosecution for a small amount of drugs, and the juror's

disrespectful eye-rolling conduct in response to a question by the judge. These reasons were race-neutral and therefore were valid under *Batson*. They also made sense. Further, to corroborate them, the prosecutor recounted that similar concern had prompted her to challenge an identified white juror too.

The judge recognized that the challenged juror and the identified white juror indeed were young. Defense counsel did not dispute the accuracy of the prosecutor's statements or their relevance to Juror 16. Because the judge conducted the voir dire, defense counsel hardly could complain that the prosecutor had asked manipulative questions of the jurors; and she never identified any comparable non-black jurors treated differently by the prosecutor.

The *Batson* question of the prosecutor's honesty "largely will turn on the question of credibility," so resolution of it is "peculiarly within a trial judge's province." Here, the trial judge was in a unique position for evaluating the demeanor of the prosecutor. He accepted the prosecutor's explanations, and the state court of appeal credited them too. The record provided no compelling grounds for rejecting those determinations. The Ninth Circuit erred in granting relief based on its mere disagreements about the facts—disagreements resulting from a "readiness to attribute error" incompatible with the deference required by AEDPA.

ARGUMENT

BECAUSE THE STATE-COURT RECORD PROVIDED RATIONAL SUPPORT FOR THE FINDING THAT THE PROSECUTOR HAD NOT CHALLENGED JUROR 16 ON ACCOUNT OF RACE, AEDPA PRECLUDES RELIEF ON RESPONDENT'S *BATSON* CLAIM

Even before the enactment of AEDPA, this Court recognized that Congress had left little room for a federal habeas corpus court to reject state-court findings of historical fact, such as that

of the honesty of the prosecutor's peremptory-challenge explanations in a claim under *Batson* v. *Kentucky*, 476 U.S. 79, especially when the findings are based on the credibility of witnesses observed by the state court. Under 28 U.S.C. § 2254, as amended by AEDPA, the federal court may not re-weigh the state-court evidence and grant relief on a claim if any rational fact-finder could have resolved the factual issues as the state court did. Here, the state record—including the explanation given by a prosecutor whose demeanor was observed by the state trial judge—provided rational support for the state court's determination accepting as truthful the prosecutor's explanation for challenging Juror 16. The Ninth Circuit Court of Appeals therefore erred under § 2254 by drawing different inferences from the same record and rejecting the prosecutor's statements as false. The Ninth Circuit's tendentious analysis, unpersuasive and unrealistic even on its own terms, resulted from a "readiness to attribute error" incompatible with the deference required by AEDPA.

I.

Under 28 U.S.C. § 2254(d) and (e), a federal habeas court may not draw different inferences and reject state court factual determinations based solely on a state-court record that provides rational support for the state court's findings.

As amended by AEDPA, the habeas corpus reforms in 28 U.S.C. § 2254(d)(2) and (e)(1) tightened the historical restrictions on the availability of the writ in cases of factual disputes. Separately and together, these provisions prohibit habeas corpus relief for challenges based on disputes about the facts arising solely from a state court record that rationally supported the state court's findings.

A. Historically, federal habeas corpus court review of state-court fact-finding and credibility determinations has been strictly minimized.

1. Prior to AEDPA, when habeas corpus deference to the state court's resolution of legal issues and "mixed" questions of fact and law was at a low ebb, see *Wright* v. *West*, 505 U.S. 277, 286-291 (1992) (plurality op.) (discussing history), this Court recognized that Congress had provided a "high measure of deference" for state-court determinations of questions of historical fact. *Sumner* v. *Mata*, 449 U.S. 539, 598 (1981). Former 28 U.S.C. § 2254(d) provided for a "presumption" of correctness for state-court factual findings if they qualified under an enumerated set of eight criteria concerning the state-court's procedures and whether the finding at least had "fair support" in the state record. A state prisoner could rebut the presumption in an "evidentiary hearing" only by presenting the federal court with "convincing" proof to the contrary.

2. In a series of opinions, this Court explicated the limits on the federal habeas courts' power to re-determine factual findings made in state court. This Court explained that the statutory presumption was not defeated when the federal court, despite ostensibly invoking the "fair support in the record" condition, rejected the state court's explicit or implicit determination of the credibility of the state-court witnesses who appeared in state court. And it emphasized that Congress had not intended to subject state-court fact-finding to review more rigorous than that permitted under the deferential standards governing fact-finding by federal trial courts.

Thus, in *Marshall* v. *Lonberger*, 459 U.S. 422 (1982), this Court reversed a federal court of appeals' decision that had granted habeas corpus relief to a state prisoner who claimed that his constitutional rights were violated by the admission of evidence of a prior criminal conviction founded on a guilty plea in which he allegedly had not been advised of the nature of the charge against him. The *Lonberger* Court disapproved the court

of appeals' decision to credit the prisoner's direct testimony—which had been at least implicitly disbelieved by the state trial judge—as its basis for rejecting the state court's factual findings as not "fairly supported by the record" under former 28 U.S.C § 2254(d). Instead, those state-court determinations "and the inferences fairly deductible" from them were binding; and they served to establish—however circumstantially—that the prisoner's plea had been intelligent and voluntary under federal standards. *Id.* at 431, 437-438.

Lonberger explained that the appropriate deference due to the state courts "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." 459 U.S. at 432. Equally fundamental, *Lonberger* recognized that "Title 28 U.S.C. § 2254(d) gives federal habeas courts *no license to redetermine the credibility of witnesses* whose demeanor has been observed by the state trial court, but not by them." *Id.* at 434 (emphasis added).

Consonant with *Lonberger,* this Court also condemned a rejection of state-court factual findings in *Maggio* v. *Fulford*, 462 U.S. 111 (1983) (*per curiam*). There, a Louisiana state judge had determined that there was no sufficient doubt warranting a formal inquiry into the defendant's competence to stand trial. *Id.* at 113-116. But the federal court of appeals dismissed the state court's factual determinations as not "fairly supported by the record" under former § 2254(d). In the court of appeals' view, uncontradicted testimony from the defendant's expert witness was persuasive and undermined the state court's finding that the last-minute motion in which the defendant had submitted the expert's testimony was a ruse to delay the trial. *Id.* at 116-117. This Court reversed, however, because the court of appeals had "erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts—*a prerogative which 28 U.S.C. § 2254 does not allow it.*" *Id.* at 113 (emphasis added). Similarly, in invalidating the Ninth Circuit's rejection of state-court fact-finding in *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (*per curiam*), this Court again

stressed that "§ 2254(d) provides that the state court's determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us."

Lonberger and subsequent cases also cited a further reason for according such respect to state-court factual determinations. Noting the deference federal appellate courts accord to district court factual findings based on the credibility of testifying witnesses, this Court in *Lonberger* stated, "We greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole,' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Id.*, at 434-435. Later, *Wainwright* v. *Witt*, 469 U.S. 412, 427 & n.9 (1985), also recognized that, since federal fact finding is accorded deferential review on direct appeal, "the respect paid such findings in habeas proceedings certainly should be no less." See *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991) (plurality op.) ("It would 'pervert the concept of federalism' * * * to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings"); see also *Francis* v. *Henderson*, 425 U.S. 536, 540 (1976) (federal habeas courts should not give lesser effect to state procedural-bar rulings than they give to federal procedural-bar rulings); accord, *Reed* v. *Farley*, 512 U.S. 339, 354 (1994).

Federal appellate review of district court fact determinations is governed, of course, by the "clear error" standard. Fed. R. Civ. Pro. 52 (a); see *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986). A basic precept of "clear error" review is that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. at 366-369 (plurality op.) (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985)). Further, "[w]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom

has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575. As reflected in the precedents cited above, Congress even prior to AEDPA had prescribed no lesser degree of deference than that of "clear error" review for determining, under the presumption-of-correctness criteria of former § 2254(d), whether there was "fair support" in the state record for fact determinations made by the state courts.

3. This Court also endorsed deferential review of state-court findings of fact in other ways. One holds particular significance to the case at bar. On the *Batson* question that underlies the issues presented in this case—i.e., whether the prosecutor's race-neutral reasons for the exercise of a peremptory challenge were her true motivations—the plurality and concurring opinions making up the majority in *Hernandez* v. *New York*, 500 U.S. 352, endorsed deferential "clear error" federal review of the state judge's finding even on direct appeal from a state criminal judgment. *Id.* at 363-370 (plurality op.), 372 (O'Connor, J., concurring).

4. Habeas corpus review of fact-finding properly must be even more deferential than that contemplated in the "clear error" appellate rule. A habeas corpus case comes to the federal court only after the state court judgment is final on appeal, so it implicates comity and finality concerns in an intensified way. See generally *Teague* v. *Lane*, 489 U.S. 288, 305-307 (1989) (plurality op.); *Duckworth* v. *Eagan*, 492 U.S. 195, 210-211 (1989) (O'Connor, J., concurring) (habeas corpus a "flashpoint of tension" between the federal government and the States). Moreover, resolution of factual questions is most accurate when done in a timely way, and by fact-finders who benefit from observation of the testimony of witnesses. Here, anomalously, the Ninth Circuit's habeas corpus review of "cold" state-court transcripts in 2003 trumped the trial judge's observation of the voir dire and his evaluation of the prosecutor's demeanor and credibility at the very time the events occurred in 1996.

The "clear error" standard might allow a federal court an extra degree of latitude to reject a district court's determination of the credibility of a testifying witness. See *Lockyer* v. *Andrade*, 538 U.S. at 75; WRIGHT & MILLER, 9A FEDERAL PRACTICE AND PROCEDURE 565-571. But this Court's habeas corpus cases provide support for the proposition that review of such state-court findings under 28 U.S.C. § 2254(d) was even more circumscribed. As noted above, this Court more than once had stated that, under former § 2254(d), the federal court could not reject the state court's resolution of questions of the credibility of witnesses.

5. Indeed, even prior to AEDPA, this Court recognized that review for rationality or reasonableness, an inquiry even more deferential than that for "clear error," is an appropriate for factual questions in federal habeas corpus cases brought by state prisoners. Thus, in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), this Court held that a state judge's findings of the factual elements of the crime for which the prisoner was committed were binding under 28 U.S.C. § 2254 if the state trial record would have allowed "any rational factfinder" to conclude that the elements had been proved under the applicable standard, beyond a reasonable doubt, in the state court. Under *Jackson*, a prisoner's challenge to the correctness of a finding of an element of the offense could not prevail if based merely upon inferences from the evidence different from a rational permissible inference in support of the finding. 443 U.S. at 318.

Further, in *Lewis* v. *Jeffers*, 497 U.S. 764 (1990), this Court held that the *Jackson* standard was applicable for reviewing fact-questions arising in state court, even in a context the Court did not consider to involve findings on the elements of a criminal offense. The *Jackson* standard was appropriate, the *Lewis* Court explained, precisely because such questions often required the state courts "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from

basic facts to ultimate facts." *Id.* at 781 ("[I]n determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the 'rational factfinder' standard established in *Jackson* v. *Virginia*"). See also *Parke* v. *Raley*, 506 U.S. 20, 36 (1992) (more-forgiving *Jackson* standard, rather than "fair support" standard of former § 2254(d), might be appropriate for some habeas corpus questions).

6. Such was the historical backdrop against which Congress acted when it passed AEDPA in 1996. This Court had interpreted the habeas corpus statute as supporting a level of deferential review of state-court fact-finding that at least approached if it did not attain the level of "rational" basis review, and as giving the federal courts "no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." As this Court knows, the purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal court" to grant habeas corpus relief. *Miller-el* v. *Cockrell*, 537 U.S. 322, 337 (2003); *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003); *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001). In enacting AEDPA, Congress for the same purpose reformed review of state court fact-finding to make it even more deferential than before.

B. The AEDPA reforms in § 2254(d) and (e) have strengthened the preclusive effect of state-court factual determinations so that they bind the federal court unless the state record provides no rational support for the findings and "clear and convincing evidence" compels the conclusion that the state-court's findings were wrong.

Demonstrating its confidence in the state courts, Congress in enacting AEDPA enhanced the state courts' primary role in

adjudicating federal constitutional claims arising out of state criminal trials. In the area of fact-finding, Congress in 28 U.S.C. § 2254(e)(2) elevated the role of the state courts by precluding federal-court evidentiary hearings, except in rare instances, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings."

Most pertinent here, Congress' AEDPA reforms strengthened the preclusive effect of factual determinations made in the state courts where the prime responsibility for factual development is channeled.

Thus, § 2254(d)(2) [(d)(2)] now provides,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> * * * *
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

In addition, Congress in AEDPA strengthened the statutory presumption of correctness for state-court factual determinations. Section § 2254(e)(1) [(e)(1)]now provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Unlike in former § 2254(d), application of the (e)(1) presumption of correctness is now unconditional; AEDPA entirely deleted what had been eight enumerated conditions or exceptions to the presumption's operation. (Cf. [Former] § 2254(d) (1995) (presumption conditioned on "adequate" state procedures, "full and fair hearing" in state court, presence of counsel in state hearing, federal court satisfaction that determination was "fairly

supported" by the state court record, etc.").[3] And, although the sole and limited means of ultimately overcoming the presumption remains explicitly prescribed, the habeas corpus applicant's burden of rebutting the presumption has been, if anything, increased. The predecessor statute required "the applicant to establish by *convincing* evidence that the factual determination by the State court was erroneous"; the AEDPA version provides that "the applicant shall have the burden of rebutting the presumption of correctness by *clear and convincing* evidence." (Emphasis added.)

Sections 2254(d)(2) and (e)(1) work in similar ways in a case in which the habeas corpus applicant, seeking no federal evidentiary hearing to present new evidence of an alleged "clear and convincing" nature, merely seeks to second-guess the weight of the evidence upon which the state court relied in resolving the facts underlying his federal claim. Where applicable, the (d)(2) provision outright precludes claims based on fact disputes if "the evidence presented in the State court proceedings" provides a minimum level of reasonable support for the state court's findings. In light of its history and the AEDPA-enhanced effect of the "presumption of correctness" afforded to state-court fact-finding, the § 2254 (e)(1) provision similarly provides no means of overcoming rational state fact-findings by a petitioner who relies on the state record and fails to properly present the federal court with cognizable new "clear and convincing" evidence to disprove those findings. Whether applied separately or together, (d)(2) and (e)(1) compel rejection of respondent's *Batson* challenge in this case.

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3. The text of the presumption-of-correctness provision of former § 2254(d) is reproduced as Appendix K to the certiorari petition.

1. Section 2254(d)(2) precludes relief on a challenge to the factual basis of a state court's merits adjudication if the state record would have allowed a rational fact-finder to determine the facts as the state court did.

a. Like § 2254(d)(1), see generally *Williams* v. *Taylor*, 529 U.S. 362 (2000), § 2254(d)(2) is a threshold provision that presumptively precludes habeas corpus relief entirely—it says "relief shall not be granted"—for claims adjudicated on their merits in the state court. Section § 2254(d)(2) deals specifically with collateral attacks founded on disputes about the facts on the basis of the state record—i.e., the precise kind of claim respondent Collins has raised in this case. See *Lambert* v. *Blackwell*, 387 F.3d 210. 241-242 (3d Cir. 2004). It applies in the case at bar, for the state court adjudicated respondent's *Batson* claim on the merits. And it states a standard naturally amenable to retrospective review of an extant body of evidence. Thus, (d)(2) allows respondent to avoid the outright bar on relief, and to then proceed to possible further inquiry into his *Batson* claim, only if the state adjudication was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceedings." See *Miller-el* v. *Dretke*, 125 S.Ct. 2317, 2325, 2340 (2005).

b. The "unreasonable determination" standard of (d)(2) defines an inquiry into whether any rational fact-finder could have found the facts as the state court did. The (d)(2) reasonableness standard conforms with that of (d)(1), which this Court has recognized to be more deferential than "clear error" review; and a *Jackson*-type standard naturally suggests itself as an expression a more-deferential inquiry into reasonableness in fact-finding.

First, the "*unreasonable* determination" standard for reviewing the state court determinations in (d)(2) provides the same level of review as is provided by the "*unreasonable* application" standard in the parallel (d)(1) provision setting forth the similar preclusive effect of state-court adjudications of

mixed questions of fact and law. Identical words in a section of a statute, of course, should be interpreted to bear the same meaning. *Estate of Cowart* v. *Niklos Drilling Co.*, 505 U.S. 469, 478 (1992).

Second, the "unreasonable application" standard in (d)(1)—and thus of (d)(2)—is even more deferential than the "clear error" standard of review that governs federal appellate review of the federal district court's fact-finding. This Court recognized that point in *Lockyer* v. *Andrade*, 538 U.S. 63, 74 (2003). Accord, *Williams* v. *Taylor*, 529 U.S. at 411. Nor would Congress require more scrutiny of mere state-court fact-finding than it prescribes for state-court rulings interpreting the scope of federal constitutional law. Even prior to AEDPA, state-court fact-finding historically had been accorded great deference where state-court rulings on federal law were accorded little or none, compare *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985), with *Sumner* v. *Mata*, 449 U.S. at 598; and broad legal questions of constitutional law implicate a greater federal interest than case-specific findings of historical facts.

Third, the standard of "objective" unreasonableness under (d)(2) points to *Jackson* v. *Virginia*-like deferential review for rationality or reasonableness, and accords with both this Court's pre-AEDPA jurisprudence and the recognized purpose of AEDPA to further restrict the availability of the writ. This Court indicated in *Parke* v. *Raley*, 506 U.S. at 36, that *Jackson* represented a logical default alternative to the "fair support" or "clear error" inquiries into state court fact-finding. This Court's line of habeas corpus cases under *Teague* v. *Lane*, 489 U.S. 288, supports this view in informing the meaning of § 2254(d)(2).

The *Teague* doctrine generally precludes habeas corpus relief under § 2254 unless "no reasonable jurist" could have rejected the interpretation of the Constitution upon which the prisoner's claim was based. See *O'Dell* v. *Netherland*, 521 U.S. 151, 164 (1997) (whether "a reasonable jurist would have felt compelled"); *Lambrix* v. *Singletary*, 520 U.S. 518, 528, 538

(1997) ("whether "the unlawfulness of [petitioner's] conviction was apparent to all reasonable jurists"); *Graham* v. *Collins*, 506 U.S. 461, 477 (1993) (whether "all reasonable jurists would have deemed themselves compelled"). To be sure, this Court has cautioned that the "no reasonable jurist" standard does not imply that the petitioner will lose simply because "at least one of the Nation's jurists" in fact has disagreed with his contention. *Williams* v. *Taylor*, 529 U.S. at 409-410. Properly understood to avoid that pitfall, then, the *Teague* "reasonable jurist" standard inquires whether it is was "objectively unreasonable" for the state court to have rejected the petitioner's proffered interpretation of the law *Id.*; *O'Dell*, 521 U.S. at 156; *Stringer* v. *Black*, 503 U.S. 222, 237 (1992); see *Beard* v. *Banks*, 542 U.S. 406, 124 S.Ct. 2504, 2512 & n.5 (2004).

This *Teague* formula of "objective reasonableness" is reflected throughout 28 U.S.C. § 2254(d). It serves as a close proxy for the "clearly-established Federal law" standard in (d)(1). *Williams* v. *Taylor*, 529 U.S. at 409-410 ("With one caveat [restricting the source of law to Supreme Court jurisprudence], whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law as determined by the Supreme Court of the United States' under § 2254(d)(1)"). And, the "unreasonable application of clearly-established Federal law" standard of (d)(1) also asks if an application of a constitutional rule is "objectively unreasonable." *Wiggins* v. *Smith*, 539 U.S. at 521; *Lockyer* v. *Andrade*, 538 U.S. at 75; *Williams* v. *Taylor*, 529 U.S. at 409-410. In light of the identical use of the term "unreasonable," the "unreasonable determination of the facts" standard in (d)(2) also involves the same kind of appraisal of "unreasonableness" as is provided in (d)(1).

c. The (d)(2) standard of heightened deference—review less intrusive than that of "clear error" and dependent upon the objective question of whether all reasonable decision-makers would have been compelled to agree with the habeas corpus petitioner—equates with the habeas corpus "any rational trier of

fact" standard described in *Jackson* v. *Virginia*, 443 U.S. 307. As with (d)(2), the *Jackson* test is an inquiry into reasonableness. See *id.* at 325. Under *Jackson*, the question on review is whether "no rational trier of fact could have found" the pertinent fact, under the applicable standard of proof, in light of the record produced at the trial. *Id.* at 324.

Review for reasonableness or rationality inquires whether any "substantial evidence" supported the trier of fact's determination. *Glasser* v. *United States*, 315 U.S. 60, 79 (1942); *People* v. *Johnson*, 26 Cal.3d 557, 576, 606 P.2d 738 (Cal. 1980); see *Powell* v. *United States*, 469 U.S. 57, 67 (1984); *Jackson* v. *Virginia*, 443 U.S. at 318-319 & n.12; accord, *United States* v. *Hedaithy*, 392 F.3d 580, 605 (3d Cir. 2004), cert. denied, 125 S.Ct. 1882 (2005); *United States* v. *Crenshaw*, 359 F.3d 977, 987-988 (8th Cir. 2004); *United States* v. *Wells*, 211 F.3d 988, 1000 (6th Cir. 2000); *United States* v. *Yousef*, 327 F.3d 56, 134 (2d Cir.), cert. denied, 540 U.S. 933, 993 (2003); *United States* v. *Shelton*, 325 F.3d 553, 557 (5th Cir.), cert. denied, 540 U.S. 916 (2003); cf. *Nance* v. *Norris*, 392 F.3d 284, 289 & n. 4 (8th Cir. 2005). The reviewing court does not "weigh the evidence" or "determine the credibility of witnesses." *Glasser*, at 79; cf. *Schlup* v. *Delo*, 513 U.S. 298, 330 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review"). It views the record in the light most favorable to the determination of the fact-finder and presumes in support of it the existence of every fact that reasonably may be deduced from the evidence. *Jackson*, 443 U.S. at 325; *People* v. *Johnson*, at 576; see *Glasser*, at 79; *Sera* v. *Norris*, 400 F.3d at 538, 547 (8th Cir. 2005); *Hedaithy*, at 605; *Crenshaw*, at 997-988; *Wells*, at 1000; *Yousef*, at 134; *Shelton*, at 557.

d. Where the state court has adjudicated the applicant's constitutional claim on the merits, and that adjudication rests on state-court fact-finding that passes muster as rational, a habeas corpus attack consisting of a mere dispute about the facts disclosed by the state record must fail. For, under those

circumstances, § 2254(d)(2) mandates that "relief shall not be granted."

2. Section 2254(e)(1) requires that a state court finding be presumed correct; and that presumption cannot be overcome by re-weighing the evidence in a state-court record if that record would have permitted a rational fact-finder to determine the facts as the state court did.

a. Even if § 2254(d)(2) were deemed inapplicable because the state court did not adjudicate the prisoner's federal claim on its "merits," or for other reasons, a petitioner in respondent's shoes still would fail in any effort to rebut the automatic "presumption of correctness" for state-court fact-finding provided in § 2254(e)(1). Sections § 2254(d)(2) and (e)(1) represent "independent requirements." *Miller-el* v. *Cockrell*, 537 U.S. at 344. To prevail on a challenge to a state court fact determination, then, a state prisoner must overcome § 2254(e)(1) as well as (d)(2). See *id.* at 340, 348; *Wiggins* v. *Smith*, 539 U.S. 510, 528-529, 530; see also *Miller-el* v. *Dretke*, 125 S.Ct. at 2325, 2340.

b. Under § 2254(e)(1), which deals with discrete findings of fact as opposed to the threshold bar on relief governed by (d)(2), see *Miller-el* v. *Cockrell*, 537 U.S. at 341, a state court factual determination is automatically presumed to be correct. That the presumption now applies in every case is confirmed by the fact that, in enacting AEDPA, Congress deleted the list of exceptions found in the predecessor version of the provision. *Valdez* v. *Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001), cert. denied 537 U.S. 883 (2002); see *Am. Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992).

The burden now always devolves upon the prisoner to rebut the presumption not just with "convincing" evidence as in former § 2254(d) but with "clear and convincing evidence." That is an extremely heavy burden. As this Court indicated in *Schneiderman* v. *United States*, 320 U.S. 118, 135 (1943),

"clear and convincing evidence" may be said to leave the question in no doubt. Indeed, a popular defense-oriented treatise characterizes the presumption as "typically *relief-barring*." HERTZ & LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (4th ed.) 825 (emphasis in original). In a case such as the one at bar—and indeed in virtually all cases in light of § 2254(d)(2) and the federal evidentiary-hearing restrictions in (e)(2), cf. *Williams* v. *Taylor*, 529 U.S. 420, 441-445 (2000)—any "clear and convincing evidence" determination would have to be made on the basis of the evidentiary record produced in the state court.

c. As the presumption no longer depends upon "fair support" for the finding in the state record, cf. former § 2254(d), a petitioner may not discharge his burden merely by second-guessing state-court fact-findings. Even under pre-AEDPA law, the federal habeas corpus court could not negate the presumption by merely re-evaluating the credibility of witnesses who appeared before the state court or by drawing different, non-necessary inferences from the same evidence considered by the state court. See pp. 16-21, *ante*. If such re-evaluation were not permitted as a way of forestalling the presumption in the first instance, it obviously could not have been employed as an appropriate means for ultimately overcoming the presumption under the "convincing evidence" provision. Indeed, the earlier presumption statute, former § 2254(d), contemplated new evidence in a federal "evidentiary hearing" as a means for doing that. Now, the presumption is unconditional and may be rebutted only by "clear and convincing evidence."

d. Congress' deletion of conditions or exceptions to the presumption, moreover, illuminates the direction in which Congress meant to move in § 2254(e)(1). In re-enacting and strengthening the presumption in different ways, Congress also had in mind this Court's earlier interpretations of the limits imposed on the federal court's power to defeat the presumption by re-determining the credibility of witnesses or by re-weighing the evidence on which the state court had made its own

determinations of fact. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress in AEDPA went even further—as it did in every other instance in which AEDPA changed the prior law governing habeas corpus for state prisoners by imposing "more, rather than fewer" limits on the availability of the writ.

Thus, § 2254(e)(1) further narrows the circumstances, if they ever existed, under which a habeas corpus applicant might defeat the presumption merely on the basis of the "cold" state court record—as respondent Collins here seeks to do. As noted above, even former § 2254(d) spoke of the applicant's opportunity to rebut the presumption in an "evidentiary hearing." It would be hard enough to meet the "clear and convincing evidence" burden based on new evidence in such a hearing. To meet that burden merely by re-arguing the facts based on the state court evidentiary record would be even harder.

As with the "relief shall not be granted" rule in § 2254(d)(2), the enhanced (e)(1) presumption, when attacked solely on the state record, cannot properly be said to be defeated by "clear and convincing evidence" if the state record contains "any substantial evidence" upon which "any rational trier of fact" could have found the facts as the state court did under the applicable burden of proof. As explained above, (d)(2) in such an instance would preclude relief on a fact-based challenge to a state court merits adjudication. Applying any more intrusive standard would risk treating § 2254(e)(1) anomalously as a relaxation rather than a tightening of the availability of the writ. And it makes sense to interpret (e)(1) as working, in the context of a case in which the petitioner offers no new evidence, in a way that comports with the way (d)(2) works.

Further, although (d)(2) applies only in cases in which the state court adjudicated the defendant's federal claim on its merits, the reality is that there will be few cases, if any, in which a state court will have undertaken fact-finding with respect to a claim without also adjudicating the claim on its merits under (d)(2). There will be fewer cases still in which the petitioner

then might come to federal court to attack such freestanding fact-finding under (e)(1) without seeking and qualifying for an evidentiary hearing to offer "clear and convincing" nature in rebuttal. Cf. § 2254(e)(2).

e. Moreover, where the state court record provides rational support for the state-court findings, it would be at best exceedingly doubtful, and perhaps logically impossible, for a federal court to nevertheless draw from that same record the powerful conclusion that "clear and convincing evidence" actually had refuted the state court's contrary but rational factual determinations. To do so in a case in which the state fact-finding is supported by a rational basis, one would have to maintain simultaneously the irreconcilable beliefs that a rational fact-finder made a determination based on reasonable support in the record but nevertheless ignored an opposite conclusion compelled by clear and convincing evidence.

f. Respondent Collins might argue that *Wiggins* v. *Smith*, 539 U.S. 510, and *Miller-el* v. *Dretke*, 125 S.Ct. 2317, indicate that this Court under AEDPA has engaged in a greater level of scrutiny of state-court fact determinations than the *Jackson* v. *Virginia* type of rationality standard would permit. And he might note that this Court in *Miller-el* v. *Cockrell*, 537 U.S. at 340, in the context of a discussion regarding § 2254(d)(2) and (e)(1), indeed stated that "[d]eference does not imply abandonment or abdication of judicial review" and that "[a] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." 537 U.S. at 340. But neither these statements, nor the results in *Wiggins* and *Miller-el v. Dretke*, are inconsistent with the State's argument.

i. The State does not claim that AEDPA deference means, or approaches, abdication. It would be hard to characterize the *Jackson* "substantial evidence" and "rational trier of fact" standard—which this Court has deemed adequate on habeas corpus to support a criminal conviction and findings required to

send a defendant to his death, see *Lewis* v. *Jeffers*, 497 U.S. at 781—as an abandonment or abdication of judicial review. Nor would it be correct to say that defendants and habeas corpus petitioners never prevail on claims governed by the *Jackson* standard. See, e.g., *Chien* v. *Shumsky*, 373 F.3d 978, 993 (9th Cir. 2004) (en banc); see also *Schlup* v. *Delo*, 513 U.S. at 330 ("under *Jackson*, the assessment of the credibility of witnesses is *generally* beyond the scope of review") (emphasis added). Prior to *Jackson*, the federal courts applied an even more forgiving standard of "any evidence" to claims now governed by the "rational fact-finder" test promulgated in *Jackson*. See *Thompson* v. *Louisville*, 362 U.S. 199 (1960). And, in light of AEDPA, *Jackson* review of the sufficiency of evidence to support a criminal conviction might yet come to reflect a more-forgiving measure of "double deference" such as that accorded to ineffective-counsel claims. See *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2003) (*per curiam*); *Juan H.* v. *Allen*, 408 F.3d 1262, 1274-1275 & n.13 (9th Cir. 2005); *Hurtado* v. *Tucker*, 245 F.3d 7, 14-19 (1st Cir. 2001). So the "any rational trier of fact" component of *Jackson* hardly represents the nadir of judicial scrutiny.

ii. *Wiggins* v. *Smith*, 539 U.S. 510, is quite reconcilable with the "substantial evidence" test and the "any rational fact-finder" standard reflected in *Jackson*. This Court in *Wiggins* rejected a state court factual determination, that defense counsel in a capital case had learned of crucial "mitigation" information from certain public documents, because the documents themselves were part of the record and absolutely demonstrated on their face that they contained no such information. 539 U.S. at 528. Where the state court record completely refutes the state finding in this way, the state's determination properly may be deemed "unreasonable" and disproved by "clear and convincing evidence."

It is true that, in rejecting the state court finding, the *Wiggins* court described that finding as a "clear factual error" and as "clearly erroneous." But it is highly doubtful that *Wiggins*

meant, by these spare phrases, to resolve the unmentioned issue of whether the "clear error" standard applies under § 2254. In *Lockyer* v. *Andrade*, 538 U.S. at 75, as noted above, this Court earlier had explicitly addressed the closely-related question of whether the familiar "clear error" applied in § 2254(d)(1) and concluded that it did not; it would be unpersuasive to argue that this Court then reached the opposite conclusion in (d)(2) without even discussing it. Moreover, *Wiggins* already had determined that the state court's evaluation of defense counsel's investigation otherwise had failed to pass muster under § 2254(d)(1); the Court's statement about clear error was not necessary to the decision. 539 U.S. at 528-529.

iii. Nor does *Miller-el* v. *Dretke*, 125 S.Ct. 2317, conflict with the State's argument in support of an "any rational trier of fact" test here. It was not made explicit what precise standard *Miller-el* v. *Dretke* brought to bear on the question of why the state's determination in that case was "unreasonable" under § 2254(d)(2) and rebutted by "clear and convincing evidence" under (e)(1). So it cannot be said that any formulation of the Court's standard in that case conflicts with that urged by the State in this case. Certainly, the Court in *Miller-el* v. *Dretke* never asserted that it was granting relief even though the record would have allowed a rational fact-finder to credit the prosecutor's jury challenges under *Batson*. Thus, the result in *Miller-el* does not reflect a wholesale or *sub silentio* retrenchment from the deference historically accorded to state-court fact-finding and now strengthened in AEDPA. To the contrary, given the "remarkable" pattern of jury strikes, the comparative analysis of jurors that the Court deemed "powerful," and the "confirming" evidence of historical practices and policies that provided the race-based explanation for suspicious and unexplained practices in Miller-el's case, the *Miller-el* v. *Dretke* opinion indicates that this Court had determined that no rational fact-finder could have rejected the inference of race discrimination in that case.

Although the Court acknowledged that "some" of the evidence was "open to judgment calls," the evidence of many of the individual tactics employed by the prosecutors appears to have pointed only toward a finding of discrimination. For example, the prosecutors had peremptorily dismissed ten of eleven African-American jurors; they had asked trick questions, meant to induce disqualifying answers, to 100% of the African-American panel members; they had repeatedly "shuffled" the waiting list when it appeared that African-American jurors were next to be called to the jury box; and they had taken the trouble to mark for no innocent reason apparent in the record, the race of the jurors on their juror cards. *Miller-el* v. *Dretke*, 125 S.Ct. at 2333, 2339. Further, the Court characterized the prosecutors' stated explanations as "implausible," "unsupportable," and "incredible," and opined that "there was no good reason to doubt" that they were pretexts for race discrimination. *Id.* at 2328, 2332, 2339. In other respects, the Court held that the race-based motives of the prosecutor, insofar as they might have appeared only probable in light of certain evidence standing alone, were ultimately "confirmed" by other evidence of the prosecution office's "policy" of excluding African-Americans from juries. *Id.* at 2332. Thus, the Court ultimately explained that "when the evidence on the issues is viewed cumulatively *its direction is too powerful to conclude anything but discrimination*." *Id.* at 2339 (emphasis added).

In addition, *Miller-el* v. *Dretke* indicated that the degree of deference accorded to the state trial judge might have been affected in the Court's estimation by a unique three-year delay between the jury selection and the later proffering of reasons by one of the prosecutors for the challenged conduct. 125 S.Ct. at 2323, 2326 n.1. Also, it is not certain that *Miller-el* limited its analysis to the self-same evidence that was before the state court—as respondent and the Ninth Circuit are limited in the case at bar. *Id.* at n. 8. In any event, *Miller-el* v. *Dretke* illustrates that a habeas corpus petitioner bears an extremely heavy burden when he seeks to argue, under § 2254(d)(2) or

(e)(2), that the state record contains no rational support for the state court's findings and "clear and convincing" evidence of the opposite.

3. In the alternative, the federal court must review very deferentially the state-court fact findings attacked by respondent; and, in any event, it may not reject them unless the state court's decision was not only insufficiently supported but "clear and convincing" evidence establishes that the state finding was wrong.

a. Even if it were assumed that habeas corpus review of state factual determinations is not as deferential as *Jackson* v. *Virginia*-type review, AEDPA and this Court's precedents require that federal review in this area be, if not stricter, then at least no more intrusive than "clear error" review. As this Court explained in *Marshall* v. *Longberger*, 459 U.S. 422, federal habeas corpus courts should not subject state court findings of fact to less deference than they accord to federal district court findings. And, as noted above, "clear error" review for *Batson* claims was endorsed in *Hernandez* v. *New York*, 500 U.S. at 366-369, even for cases on direct rather than collateral review from the state courts. There could be no convincing basis for a more intrusive level of federal scrutiny.

b. Finally, because the presumption is now automatic and the "fair support" condition has been eliminated, a mere lack of evidence to support an affirmative finding by the state court does not end the inquiry under § 2254(e)(1). Regardless of whether a state court finding were deemed untenable for the distinct purpose of § 2254(d)(2), the automatic § 2254 (e)(1) presumption still would require that the prisoner in any event establish the incorrectness of the state-court finding by "clear and convincing evidence."

II.

Because a rational fact-finder applying the appropriate standard of proof could have determined that the prosecutor in fact had challenged Juror 16 for race-neutral reasons, the state court's findings to that effect were binding on the Ninth Circuit and required dismissal of respondent's *Batson* claim.

The record in this case provided the requisite rational support for the factual determinations made by the state court in applying the criteria set out in *Batson* v. *Kentucky*, 476 U.S. 79. It also provided enough support to pass muster under a "clear error" standard. See *Hernandez v. New York*, 500 U.S. at 366-369; *id.* at 372 (O'Connor, J., concurring). Indeed, the record makes it clear that the prosecutor did not engage in any discrimination proscribed by *Batson* and its progeny.

Under *Batson*, a prosecutor's use of peremptory challenges to remove a juror based on race violates the Equal Protection Clause. This Court has outlined, at least for purposes of trial and direct appeal, a "three-step process for evaluating such a *Batson* claim. First, the defendant must make a prima facie showing—that is, raise an inference—that the prosecutor has challenged a juror or jurors based on race. *Johnson* v. *California*, 125 S.Ct. 2410, 2418-2419 (2005). Second, if the showing has been made, the prosecutor must articulate a race-neutral reason for the challenges. Third, the trial judge must then determine whether, under all the circumstances, the defendant has carried his ultimate burden of proving racial discrimination. See *Hernandez* v. *New York*, 500 U.S. 352, 358-359 (1990) (plurality opinion). A finding of whether a prosecutor intentionally discriminated is a finding of fact. *Miller-el* v. *Dretke*, 125 S.Ct. at 2325; *Hernandez*, at 364-365; see *Batson* v. *Kentucky*, 476 U.S. at 98 n.21.

A. The record provides substantial evidence affording rational grounds for the finding that the prosecutor challenged Juror 16 for reasons other than race.

1. Resolution of the factual question implicating § 2254(d)(2) and (e)(1)—whether the state court record supported the state-court determinations that the prosecutor in her own mind had challenged Juror 16 for race-neutral reasons—should have been simple for the Ninth Circuit. From the beginning, any initial inference of discrimination was weak. See *Hernandez* v. *New York*, 500 U.S. at 370 (plurality op.). The prosecutor had challenged only two non-African-Americans and two African-Americans. And the prosecutor's reason for challenging Juror 19—her naive statements about her daughter's drug use—were obviously well-founded; indeed, respondent abandoned his objection to it in the state appeal long ago. Moreover, the charged drug-possession crime had no identifiable "victim" different from respondent's race.

When directly asked about Juror 16, the prosecutor readily explained that she had exercised the peremptory challenge because of Juror 16's youth and unmarried status and what that might imply—i.e., a possible lack of community ties and tolerance of drug usage in a recidivist prosecution for possession of a small amount of drugs—and because of the juror's specifically-described disrespectful eye-rolling conduct in the jury box. These were hardly "implausible" or "fantastic" justifications, see *Purkett* v. *Elem*, 514 U.S. at 768, that would have compelled a rational fact-finder to discredit them. To further support her explanation, the prosecutor noted that she also had challenged an identified white juror on account of youth, single-status, and "no ties."

The judge recognized that the challenged juror and the identified white juror indeed were young. Defense counsel did not dispute the accuracy of the prosecutor's statements or their relevance to Juror 16. Because the judge conducted the voir dire, defense counsel hardly could complain that the prosecutor

had asked manipulative questions of the jurors; and she never identified any comparable non-African-American jurors treated differently by the prosecutor. Then, having questioned the prosecutor further, listened to the prosecutor's explanation, and observed the prosecutor's demeanor, the judge overruled respondent's objection.

As this Court has observed,

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. *There will seldom be much evidence bearing on that issue, and the best evidence will often be the demeanor of the attorney who exercises the challenge.* * * * [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985), citing *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984).

Hernandez v. New York, 500 U.S. at 365 (plurality op.). Such was the case in respondent's trial.

2. This case is close to polar opposite of *Miller-el* v. *Dretke*, 125 S.Ct 2317. There, the prosecutors had peremptorily challenged ten of the eleven available African-American jurors, so that "[h]appenstance [was] unlikely to produce this disparity." *Id.* at 2327. Here, as noted, the prosecutor challenged only two African-Americans and two non-African-Americans; there was no showing in the record how many African-Americans remained in the venire; and, at the time of the *Batson* challenge, one or two African-Americans remained in the jury box. In *Miller-el*, the prosecutors engaged in an extraordinarily high rate of disparate questioning of African-Americans and non-African-Americans, and in a suspicious and otherwise unexplained pattern of "jury shuffling" that rendered it less likely the African-Americans would serve. *Id.* at 2332-2338. Here, in contrast, the judge rather than the lawyers

carried out the voir dire. Nor did respondent ever fairly present to the State court any allegation that the prosecutor had failed to strike similarly-situated non-African-American jurors. Cf. *id.* at 2336-2340 & n.2. Finally, in *Miller-el*, there was a documentary history of discriminatory practices and procedures in the prosecutor's office that "confirmed" the race-basis of the prosecutors' suspicious and unusual tactics. But nothing like that evidence was produced by respondent in this case.

B. Any contrary circumstantial evidence was insignificant; and, by choosing to accept such evidence as true, the Ninth Circuit completely failed to accord the state courts the deference mandated by AEDPA.

The two-to-one majority on the Ninth Circuit panel improperly accorded no deference to the state courts' *Batson* rulings in this case. As the dissenting opinion and the later five-judge dissent from rehearing aptly discerned, the panel majority merely "substitute[d] its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court" and then improperly "insist[ed] that any perspective other than its own must be unreasonable."

1. The Ninth Circuit's departure from AEDPA and the rule of deferential review is obvious, first, in its implacable attitude toward the prosecutor's statement that, as she had done with African-American Juror 16, she also had challenged white Juror 6 on account of his youth and lack of community ties. The panel majority disbelieved the prosecutor simply because it perceived a possible different reason for the prosecutor's challenge to Juror 6. Even under "clear error" review, less deferential to the states than the standard the State presses here, the federal court should not have chosen to accept this view of the evidence over a permissible view that supports the state court ruling. See *Anderson* v. *Bessemer City*, 470 U.S. at 574.

2. The Ninth Circuit panel's hostile "gotcha" attitude is also apparent in its treatment of what six other Ninth Circuit judges

understood was merely an accidental reference by the prosecutor at one point to Juror 16 and "Juror 019"—rather than Juror 16 and "Juror 006". When asked for her explanation, the prosecutor discussed challenged Juror 16 and then challenged Juror 19 in sequence. In first discussing African-American Juror 16, the prosecutor noted that she had challenged both Juror 16 and white Juror 6 on account of their youth and her resultant concerns about drug-use tolerance and her concerns that they were "single" with no community "ties." Then, separately discussing her reasons for challenging Juror 19, the prosecutor spoke solely about that juror's puzzling statements about her daughter's cocaine problem.

Certainly, the prosecutor would have discerned no advantage in baldly attempting to portray Juror 19, the retiree grandmother with seven children, as too young and thus raising the concerns she had mentioned with respect to Juror 6 and 16. That the prosecutor made no attempt to mislead the court in this way is confirmed by the fact that she was engaged, at almost the very same moment, in explaining that she had challenged Juror 19 based upon that juror's statements about her adult daughter's drug use.

This Court has instructed federal habeas corpus courts not to rush to impose malign constructions on the remarks of prosecutors, see *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974), and to guard against a "readiness to attribute" error" in AEDPA review of state court decisions. *Woodford* v. *Visciotti*, 537 U.S. 19, 23 (2003) (*per curiam*). Yet the Ninth Circuit seized upon the prosecutor's simple mistake to draw the exaggerated and improbable conclusion that her peremptory-challenge explanations therefore could not be trusted as honest. JA 54-55. It then employed that strained conclusion in upsetting the fact-finding of the state judge who had believed the prosecutor after observing her with his own eyes.

3. The panel majority was wrong, again, in rejecting the prosecutor's race-neutral explanation that she had excused Juror 16 on account of concerns associated with her youthfulness.

The majority recognized, correctly, that challenging a juror based on youth does not offend the Equal Protection Clause. JA 45; accord, *United States* v. *Jackson*, 983 F.2d 757, 762 (7th Cir. 1993); *People* v. *Sims*, 5 Cal.4th 405, 430, 853 P.3d 992 (Cal. 1993). Perhaps more to the point in this AEDPA case, this Court has never held that a juror's youth is an impermissible criterion for peremptory challenges. So the state courts, in accepting the juror's youthfulness as a valid basis for the strike, did not rule "contrary to" or "unreasonably" apply any "clearly established Federal law" under 28 U.S.C. § 2254(d)(1).

a. Despite this, the panel majority unnecessarily and impermissibly rejected the prosecutor's race-neutral concerns about Juror 16's youthfulness. The first of the panel's reasons is patently unrealistic. Because the prosecutor had explained that youthful jurors such as Juror 16 lacked "ties to the community" and might be "too tolerant" of drug usage, the panel apparently concluded that the prosecutor's challenge somehow had not been based on the juror's young age at all. JA 48. For this same reason, it was wrong for the panel to suggest that the state courts unreasonably had "glossed over" this "clarification" of the prosecutor's actual or stated reasons.

b. Second, the panel rejected the prosecutor's asserted beliefs on these youth-related points as pretextual because the record did not prove them to be true about Juror 16 personally, and as impermissible because they were not "relevant" or "clear and specific." JA 46-52. Here, again, the panel's conclusion was improperly adversarial, strained, and unnecessary. Further, in requiring that the record prove that the prosecutor's assumptions about youthfulness specifically applied to Juror 16 personally, the panel's analysis radically departs from the limited inquiry into peremptory-challenges tactics authorized by this Court's *Batson* jurisprudence.

Batson and its progeny express condemnation of peremptory challenges based on race, ethnicity, or sex. See *J.E.B.* v. *Alabama ex rel T.B.*, 511 U.S. 127 (1994); *Hernandez* v. *New York*, 500 U.S. at 355 (plurality op.). Discrimination on such

grounds is subjected to heightened judicial scrutiny under the Equal Protection Clause. See *J.E.B.*, at 140-141 fns. 11-13 (1994). The *Batson* cases have not held it improper to exercise peremptory challenges base don on race-, ethnicity-, or gender-neutral reasons. In any event, they do not "dictate" or "clearly establish," for purposes of the retroactivity doctrine of *Teague* v. *Lane* and the deference standard of 28 U.S.C. § 2254(d)(1), that it is unconstitutional to exercise jury challenges based assumptions about prosaic or transitory characteristics that are not "likely to stigmatize as well as to perpetuate historic patterns of discrimination" against people in "suspect classifications." See *J.E.B.*, at 1427 n. 11.

Thus, although trial judge is not compelled to accept them, the *Batson* cases allow for honest reliance on characteristics such as a juror's long hair or other "silly" or "superstitious" reasons. See *Purkett* v. *Elem*, 514 U.S. 765, 768-769 (1995) (*per curiam*). Because youthfulness is not an unconstitutional criterion for a peremptory challenge, the prosecutor in this case was entitled to honestly rely on such reasons. Even more obvious, she was entitled to rely on reasons that were sensible rather than silly or superstitious. Here, the prosecutor's challenge was lodged in the context of a Three Strikes Law prosecution of a defendant for simple possession of a small amount of cocaine. A prosecutor rationally might believe that prosecution of such an offense might seem unjustified or unimportant to youthful people who might tend to have more permissive attitudes about drugs, or to young and single people with no long-standing stake in the community. Accordingly, she honestly might wish to exclude them or reduce their presence on the jury so as to maintain a critical mass of older jurors who reasonably might tend to present a contrary view for consideration during jury deliberations. *Batson* does not proscribe reliance on "any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause." *Miller-el* v. *Dretke*, 125 S.Ct. at 2324.

c. Third, the Ninth Circuit characterized the prosecutor's reasons in this regard as not "clear and specific" or "related" to the case. JA 46-52. In doing this, the panel ignored this Court's explanation that its *Batson* warning about the need for the prosecutor to give clear and specific reasons "related to the particular case to be tried,"

> was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had motive or by merely affirming his good faith. What it means by a "legitimate reason" is not that makes sense, but a reason that does not deny equal protection.

Elem, 514 at 768-769. Thus, in the context of this case, "[a] neutral explanation * * * means an explanation based on something other than the race of the juror." *Hernandez* v. *New York*, 500 U.S. at 360. If the proffered race-neutral reason is found to be genuine and honest, then the defendant will have failed to prove his *Batson* claim of racial discrimination. *Id.* at 367.

To put it another way: insofar as the Ninth Circuit panel at various points seemed to accept the view that the prosecutor's true reason for challenging Juror 16 was not youth but "drug-use tolerance," and "lack of community ties" see JA 48, its necessarily concluded not only that the prosecutor's reason was proper in that it was race-neutral on its face and the true and honest reason in fact. Similarly, under the version of events adopted by respondent in the California Court of Appeal, the prosecutor dismissal of Juror 16 for the sole reason of youth did not give rise to a *Batson* violation.

4. Nor—notwithstanding the unnecessary adverse inference the Ninth Circuit panel chose to draw—did the record compel any conclusion that the prosecutor's peremptory challenges had been based on the jurors' sex. The prosecutor had exercised her second peremptory challenge against Juror 6, a man, at a time

when there was a clear predominance of women jurors in the box. See JA 100-160 et seq. When first asked by the judge to give her reasons, the prosecutor's specific explanations about the characteristics of Jurors 16 and 19 included no mention of their sex as a reason for her peremptory challenges. RT 67.

It is true that, when later asked by the judge for further comments, the prosecutor indeed mentioned their sex—but not as a reason for their dismissal. Instead, the prosecutor mentioned the sex of the two challenged jurors, and the sex of the defendant and of another juror, as part of an argument offered to forestall any claim or conclusion that she somehow might have been engaged in a course of conduct to excuse jurors of the defendant's male sex and to remind the judge that she had not exercised any challenge against other African-American people, including another African-American woman, still in the jury box. RT 68. It was in this context that the prosecutor broadly referred to case law "for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area." The reasons she had most recently discussed for excusing Jurors 16 and 19 concerned age and inexperience; and the arguments she offered for why her reasons should be credited in part concerned the absence of any attempt on her part to purge the jury of either African-American males or African-American females.

Still later, when the judge asked the prosecutor for case law supporting the notion that peremptory challenges may be exercised on the basis of sex, the prosecutor merely answered the judge's question without ever adopting the premise that she had acted on such a basis. In her remarks to the judge in response to his questions about sex being a "suspect classification," the prosecutor continued to speak of justifications such as "youth" and "ties in the community" and, if anything, seemed somewhat oblivious to any possibility that she had ever offered the fact of Juror 16's or Juror 19's sex as a reason for her peremptory challenges. RT 70-71.

At the end of the discussion, the trial judge remarked, "I don't see, Ms. [Prosecutor], that you are seeking to justify excusing people of one ethnicity based on their gender." RT 71. It might be argued that the judge's added comment—"I don't think that is going to cut it"—introduced some uncertainty about his views. But any such uncertainty would hardly support an affirmative conclusion that the judge actually had found the jurors' sex to have been a reason for the prosecutor's challenges. For, without ever mentioning such a thing, let alone purporting to find that the prosecutor actually had relied on the jurors' sex as her reasons for the challenges, the judge in his ultimate ruling instead accepted the prosecutor's invocation of youth and demeanor as the prosecutor's reasons for challenging Juror 16 and her invocation of the second juror's "experiences with a family member who had a drug problem" as the prosecutor's reason for challenging Juror 19. RT 71.

The Ninth Circuit's conclusion that the prosecutor in some way relied on the challenged jurors' sex in exercising her peremptory strikes, accordingly, was based on a record that, at most, was too ambiguous to sustain that conclusion even under a simple preponderance-of-evidence standard. Still less does the record sustain such a conclusion under the "clear and convincing evidence" and "unreasonable determination of the facts" provisions of 28 U.S.C. § 2254(d)(2) and (e)(1).

Even if the evidence somehow clearly and convincingly showed that the prosecutor in fact had relied to some degree on the jurors' female sex as a reason for her challenges, the state courts' rejection of respondent's *Batson* claim still would not be assailable under § 2254(d) as either "contrary to"or an "unreasonable application of" the jury-challenge legal doctrine "clearly established" in the holdings of this Court's *Batson* line of cases. There has been no finding that the prosecutor's cited reasons of youth and demeanor—much more prominent in the record of the discussion—would not have prompted her to challenge Juror 16 anyway. See generally *Kesser* v. *Cambra*, 392 F.3d 327, 337 (9th Cir. 2004).

In any event, this Court has not held that mix[ed motives, some proper and some improper, render a litigant's peremptory challenge of a juror unconstitutional. See *Rico* v. *Leftridge-Byrd*, 340 F.3d 178, 185 (3d Cir. 2003) ("The Supreme Court has not yet addressed mixed motives in jury selection"). In *Batson*, this Court only invalidated strikes based "solely" on race. 479 U.S. at 88; see *Hernandez* v. *New York*, 500 U.S. at 373-374. To grant retroactive relief by "extending" *Batson* a further step to cover a strike merely because the prosecutor's motive allegedly might have been mixed in this circumstances of this case would violate both § 2254(d)(1) and the *Teague* v. *Lane* anti-retroactivity doctrine. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004); *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994).

5. Next, the panel incorrectly suggested that the state court unreasonably had failed to consider evidence that the prosecutor had eschewed challenging Juror 15, whom the panel portrayed as "a white juror who possessed the same objective characteristics as Juror 16." JA 50. The panel did not explain why the state court would have been required to conclude that Juror 16 was white or even that she was not African-American. Nor was it tenable for the panel majority to suggest that Jurors 15 and 16 should have seemed similarly situated in the prosecutor's view—for it was only Juror 16 who engaged in the disrespectful eye-rolling in response to the judge's comments. Nor could such a comparison be compelling in the context of this case, where the number of peremptory challenges and the number of challenges to African-American jurors was low, and where there was no evidence of other suspicious tactics. Cf. *Miller-el* v. *Dretke*, 125 S.Ct. at 2325, 2332-2340.

Even if the prosecutor had struck Juror 15 too, it is doubtful that it would have satisfied a court that approached the record without appropriate deference, as the panel majority in this case did. Its treatment of a comparable situation shows this. As noted above, when the prosecutor explained that she had not challenged youthful white Juror 6 for the same reason she

applied to Juror 16, the panel chose to disbelieve her anyway, simply because there might have been some other respect in which the two jurors differed. Ironically, to the extent "comparative analysis" might reveal anything in this case, a comparison of the panel's own treatment of Jurors 15 and 16 on the one hand, and Jurors 6 and 16 on the other, illustrates the inappropriate eagerness to find error that pervades the Ninth Circuit opinion.

Even if the juror comparisons were relevant, there still would be no basis to say that the state court had acted "unreasonably" by "failing to consider" the evidence in this regard. In *Early* v. *Packer*, 537 U.S. 1, 9 (2002) (*per curiam*) this Court summarily rejected the Ninth Circuit's similar attempt to rely, as a purported justification for refusing to defer to a state court ruling under § 2254(d), on the absence of an explicit statement by the state court that it had considered the impact of certain evidence. In reversing this Circuit's decision summarily, as it has done in other Ninth Circuit AEDPA decisions that failed to defer to the state courts, this Court explained that the state court need not issue such a "formulary statement." Accord, *Miller-el* v. *Cockrell*, 537 U.S. at 347 (no need for "detailed findings addressing all the evidence"). Section 2254(d)(2), of course, speaks of reasonableness not as a function of state fact-finding and fact-explaining *procedures* but of the "*evidence* presented in the State court proceedings" instead.

The *Packer* rule is particularly apt here: for respondent never mentioned anything to the state trial judge or to the state court of appeal about what the comparative analysis of the struck and non-struck jurors, subsequently undertaken for the first time by the Ninth Circuit, would show. Indeed, in the state appeal, the premise of respondent Collins' argument was that the prosecutor indeed had challenged Juror 16 for the non-racial reason of youth.

6. Finally, the panel erred in ruling that the state appellate court had engaged in an "unreasonable determination of the facts" under § 2254(d)(2) in ruling that nothing in the record

showed that the trial judge had failed to approach his *Batson* duty appropriately. JA 59-61. It is hard to discern whether this criticism is an argument about what facts the evidence proved or whether the state judge's undisputed method of conducting the peremptory-challenge inquiry was inadequate as a matter of law under *Batson*. Either way, the critique fails.

The record shows that the trial judge conscientiously carried out *Batson*'s essential requirements. Upon the defense objection, the judge ascertained whether there was a prima facie case of discrimination. The judge's attentiveness to *Batson* concerns is illustrated quite clearly by the fact that, although he had discretion to decline to find a prima facie case, he instead found one and precipitated a hearing outside the jury's presence. In that hearing, he asked for the prosecutor's reasons, as *Batson* provides. He followed up with further questions that challenged the prosecutor and reflected an understanding of the *Batson* line of case. He invited and heard the defense's argument. Defense counsel never claimed that she had not observed Juror 16's "eye-rolling," and never denied that it had occurred. In the end, the judge recognized the race-neutral nature of the prosecutor's reasons, forthrightly noted that he had not seen the challenged facet of Juror 16's cited demeanor, and ruled that he was giving the prosecutor the benefit of the doubt—a resolution that is completely compatible with *Batson*, which places and keeps the burden of proof on the party seeking to prove discrimination. See *Johnson* v. *California*, 125 S.Ct. at 2417.

As Judge Bea cogently explained in his dissenting opinion in this case,

> The panel opinion concluded, irrationally, that because the trial judge did not see the eye-rolling, the state appellate court was unreasonable in approving the prosecutor's strike. * * * * [I]t does not matter whether the state trial judge noticed the eye-rolling, or even whether there actually was any eye-rolling. All that matters is whether the prosecutor intentionally lied about the eye-rolling to make an excuse for getting an African American woman off the jury. If the prosecutor was really striking Juror 016 because she thought the juror rolled her eyes and not because she was African American, she had a right to strike her, even if she was mistaken about whether the eye-rolling actually occurred. In this case, the trial judge thought the prosecutor was telling the truth, and the state appeals court saw no reason to doubt it.

JA 9.

Under the rational fact-finder standard reflected in *Jackson* v. *Virginia*, 443 U.S. at 319, the court must the evidence in the light most favorable to the State. Under any recognized deferential standard, the state court's findings here must stand.

C. The state court determination validating the prosecutor's non-racial motives is binding in federal court, so there is no basis for concluding that the state court's rejection of respondent's *Batson* claim was "contrary to" or an "unreasonable application" of *Batson*, or that respondent's rights were violated.

The state court's finding accepting as truthful the prosecutor's stated reasons for excusing Juror 16 sounds the death knell for respondent's *Batson* claim. See *Hernandez* v. *New York*, 500 U.S. at 367. The Ninth Circuit's circumvention of § 2254(d)(2) and (e)(1)'s requirements of deference to state court fact-finding cannot be condoned.

The State, of course, agrees with this Court that racial discrimination in jury selection is wrong not just because of the violation of trial rights and the harm to minorities, but also because it damages public respect for and confidence in the judicial system. *Miller-el* v. *Dretke*, 125 S.Ct. at 2323-2324. Precisely because of the welcome consensus that race discrimination is wrong, the effect of a judicial finding of such

discrimination can have a toxic effect on a prosecutor's reputation, and can itself foster belief that racism pervades the jury-selection process. A court therefore also has an obligation to ensure that its finding of racial discrimination under *Batson* is well-founded. The Ninth Circuit failed in that obligation and in its obligation to respect the state courts under AEDPA.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: August 29, 2005

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No. 04-52

IN THE

Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

v.

STEVEN MARTELL COLLINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATES OF ARIZONA, COLORADO, CONNECTICUT, IDAHO, IOWA, MASSACHUSETTS, MICHIGAN, NEVADA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WASHINGTON IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

DOES 28 U.S.C. § 2254 ALLOW A FEDERAL HABEAS CORPUS COURT TO REJECT THE PRESUMPTION OF CORRECTNESS FOR STATE FACT-FINDING, AND CONDEMN A STATE ADJUDICATION AS AN UNREASONABLE DETERMINATION OF THE FACTS, WHERE A RATIONAL FACT-FINDER COULD HAVE DETERMINED THE FACTS AS DID THE STATE COURT?

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INTEREST OF AMICI

Amici States have a compelling obligation to protect the finality of judgments rendered in their criminal courts. The undoing of this finality in federal habeas corpus litigation undermines public safety, deterrence of crime, and effective rehabilitation; and the passage of time increases the risk of unfairness and inaccuracy in later re-trial of the criminal case. Additionally, under the doctrines of comity and federalism, Amici States have a compelling interest in their state court fact-findings and legal conclusions being protected from overreaching federal courts. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted reforms giving state court judgments their due deference while simultaneously strengthening the longstanding deference owed to state court factual findings. The decision from the Ninth Circuit Court of Appeals undermines both of these principles.

SUMMARY OF ARGUMENT

State court factual findings have long been clothed in this Court's presumption of correctness. Over the last 40 years, this presumption has expanded, both through the case law from this Court and from the passage of the Antiterrorism and Effective Death Penalty Act in 1996.

However, the passage of the AEDPA created two new sections of law dealing with state court factual determinations, 28 U.S.C. §§ 2254(d)(2) and (e)(1), which various Circuit Courts of Appeal have construed differently. Under the Fifth Circuit approach, a court first looks at the facts under 28 U.S.C. § 2254(e)(1) and then determines whether those facts are reasonable under 28 U.S.C. § 2254(d)(2). The Ninth Circuit takes the opposite approach, making a determination whether the ultimate decision is objectively reasonable. If the decision is not objectively reasonable then the state factual findings are not entitled to deference. Under the Third Circuit approach, a federal district approach can start with either prong, because the two

sections serve separate legal purposes. Amici believe the Third Circuit approach gives the proper deference to the concepts of comity and federalism that are an integral part of the federal habeas corpus jurisprudence, particularly the AEDPA, and when the current case is properly analyzed giving due weight to both 28 U.S.C. § 2254(d)(2) and to 28 U.S.C. § 2254(e)(1), then the decision from the Ninth Circuit cannot stand and must be reversed.

ARGUMENT

A. Evolution of Habeas Jurisprudence

This Court has long recognized that historical factual findings from state courts, as opposed to mixed questions of law and fact, are owed great weight in federal habeas corpus litigation. *Townsend v. Sain*, 372 U.S. 293 (1963). *Townsend* articulated six circumstances where an evidentiary hearing would not be necessary in federal court. *Id.* at 313. *Townsend* also made clear that while "the state court has reliably found the relevant facts, [the federal court should] defer to the its findings of law." *Id.* at 318 (brackets added). Congress responded to *Townsend* in 1966, inserting subsection (d) to 28 U.S.C. § 2254. The new 28 U.S.C. § 2254(d) included a modified version of the *Townsend* factors. *See* Pub. L. 89-711, § 2(d).[1] Following the 1966 amendment, 28 U.S.C. § 2254(d) read:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the

[1] In 1973, this Court called *Townsend* "the precursor" to the 1966 amendments to 28 U.S.C. § 2254. *LaVallee v. Delle Rose*, 410 U.S. 690, 694 (1973) (per curiam).

> application for the writ and the State or an officer of or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair and

adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.[2]

After Congress enacted 28 U.S.C. § 2254(d) in 1966, this Court did not address this statutory provision for almost six years. The first time the statute was noted in an opinion, this Court concluded (with scant analysis) that an evidentiary hearing was required because facts had been inadequately developed in state court. *Boyd v. Dutton*, 405 U.S. 1, 3 (1972). A year after deciding *Boyd*, this Court for the first time reversed the granting of a writ of habeas corpus because the state court employed acceptable fact-finding under 28 U.S.C. § 2254(d). *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1973) (*per curiam*). *LaVallee* concluded that because the state court applied the correct legal standard in its analysis, the federal courts could assume the state court made

[2] This version of 28 U.S.C. § 2254(d) was in place 30 years later when Congress enacted the AEDPA.

unstated factual findings that supported its conclusion. *Id.* at 694.

The parameters of 28 U.S.C. § 2254(d) received no further Supreme Court interpretation until 1980.[3] That year, this Court reiterated the difference between "basic, primary, or historical facts" and the legal conclusions that could be drawn from them. Relying on *Townsend*, this Court held the former were entitled to deference pursuant to 28 U.S.C. § 2254(d), while the latter were not. *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

Four years later, this Court determined that both of the prongs for claims of ineffective assistance of counsel involve legal conclusions and not mere factual findings entitled to deference. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). The next year, this Court held that the ultimate issue of whether a confession is voluntary involves a question of law not entitled to deference. *Miller v. Fenton*, 474 U.S. 104, 112 (1985).

A year after *Cuyler*, this Court emphatically stated that the "interest in federalism recognized by Congress in enacting 28 U.S.C. § 2254(d) requires deference by federal courts in factual determinations of all state courts." *Sumner v. Mata*, 449 U.S. 539, 547 (1981) (*Sumner I*). *Sumner I* also held:

> [I]t is clear that in adopting the 1966 amendment, Congress in § 2254(d) intended not only to minimize that inevitable friction [between federal and state courts] but also to establish that the findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions

[3] It is true that 28 U.S.C. § 2254(d) was mentioned in other opinions. However, these cases provided no real analysis of 28 U.S.C. § 2254(d). *See, e.g., Brewer v. Williams*, 430 U.S. 387, 396-97 (1977) (merely noting that the federal district court relied on state record in reaching its decision).

> specifically set forth in § 2254(d) was found to exist by the federal habeas court. If none of those seven conditions was found to exist, or unless the habeas court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish *by convincing evidence* that the factual determinations by the State court was erroneous."

Id. at 550 (emphasis in original) (bracketed text added). To emphasize the point, *Sumner I* was revisited a year later, and, in a short, *per curiam* order, this Court held, "Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact 'is not fairly supported in the record' may the presumption properly be viewed as inapplicable or rebutted." *Sumner v. Mata*, 455 U.S. 591, 592 (1982) (*per curiam*) (*Sumner II*).

A year after *Sumner II*, this Court further explained the contours of 28 U.S.C. § 2254(d) and the deference owed to state court factual findings. "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) (internal punctuation omitted).[4] Citing *LaVallee*, *Marshall* also reiterated the principle that factual findings could be presumed based upon a state court's responsibility to follow the law. *Id.* at 433-34.

[4] Complementing *Marshall*, this Court subsequently held in another case that the Eleventh Circuit erred in substituting its own view of the facts for that of the Florida Supreme Court. *Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (*per curiam*).

Marshall emphasized, "28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." 459 U.S. at 434.[5] Finally, *Marshall* noted, "We greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Id.* at 434-35.

Contemporaneously with *Marshall*, this Court found that a question of juror bias was entitled to deference. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*). The next year, *Rushen* was cited for the proposition that questions about a juror's perceptions about pre-trial publicity deserved similar deference. *Patton v. Yount*, 467 U.S. 1025, 1036-37 (1984). One term later, this Court found that a trial court's determination that a prospective juror could be excused for cause based on the juror's bias in rendering the death penalty also was similarly entitled to deference. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

Likewise, when a person is charged with "felony murder," the state findings of culpability for the underlying felony are entitled to presumptions of correctness. *Cabana v. Bullock*, 474 U.S. 376, 388 (1986). Similarly entitled to a presumption of factual correction is a determination that a defendant would have perjured himself if he testified. *Nix v. Whiteside*, 475 U.S. 157, 182 (1986).

By 1992, this Court had held that while mixed questions of law and fact were not entitled to deference, inferences drawn from questions of historical fact were so entitled. *Park v. Raley*, 506 U.S. 20, 35 (1992).

Indeed, after *Marshall*, this Court began to routinely note that there were state factual findings entitled to

[5] This Court used a brief *per curiam* decision at the end of the same term to reiterate the point. *Maggio v. Fulford*, 462 U.S. 111, 113 (1983) (*per curiam*). *Maggio* also held that a determination of competency is entitled to deference. *Id.* at 117. *Accord Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (same).

deference, with little more than passing reference. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 417 (1986) (state supreme court's recitation of facts of case entitled to deference); *Kuhlman v. Wilson*, 477 U.S. 436, 441 (1986) (same); *Parker v. Dugger*, 498 U.S. 308, 320 (1991) (same). *See Schiro v. Farley*, 510 U.S. 222, 232 (1992) ("Ordinarily on habeas review, we presume the correctness of state court findings of fact").

However, the deference was not unfettered. The question of whether a confession was voluntary remained subject to independent federal determination. *Miller v. Fenton*, 474 U.S. 104, 113, 115, 117 (1985). Likewise, this Court had no hesitation in finding that Florida's procedure for determining competency to be executed was not entitled to deference. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Nor did this Court hesitate in determining that a post-trial bail hearing was insufficient to provide a full hearing on a claim. *Kimmelman v. Morrison*, 477 U.S. 365, 388 (1986).

Almost a decade later, this Court determined that the question of whether someone was in custody for *Miranda* warning purposes was a mixed question of law and fact, and not entitled to deference.[6] *Thompson v. Keohone*, 516 U.S. 99, 112 (1995).

Most significantly with respect to the current case, this Court found that even when "directly reviewing" a *Batson*-type[7] allegation, the "credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Hernandez v. New York*, 500 U.S. 352, 367 (1991). Additionally, "Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is, as *Batson* recognized, a question of historical fact." *Id.* at 367.

In a pre-AEDPA habeas case applying *Batson*, this Court held:

> In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly supported by the record." 28 U.S.C. § 2254(d)(8).
>
> Here the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record. For its whole focus was upon the *reasonableness* of the asserted nonracial motive (which it thought required by step two) rather than the *genuineness* of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility.

Purkett v. Elem, 514 U.S. 765, 769 (1995) (citations omitted) (emphasis in original). In a post-AEDPA setting, this Court found that the finding of absence of discriminatory intent is a factual one entitled to a presumption of correctness. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*).[8] However, deference does not preclude relief. *Id.* at 340.

B. The Current Federal Habeas Corpus Statute

As this Court knows, in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). The former section (d) of 28 U.S.C. § 2254 was heavily amended

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[7] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[8] Last term, this Court found that the presumption of correctness had been overcome. *Miller-El v. Dretke*, 125 S.Ct. 2317, 2340 (2005) (*Miller-El II*). *Miller-El II* will be discussed at length, *infra*.

and became the new subsection (e). Further, a new subsection (d) was added, which provides:

> An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The relevant portion of the 28 U.S.C. § 2254(e)(1) now reads:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

As noted, the former 28 U.S.C. § 2254(d) was amended to remove the eight limitations to the presumption

of correctness for factual issues and severely circumscribed the ability of a federal court to hold an evidentiary hearing on a state claim. *Compare* 28 U.S.C. § 2254(d) (former law) *with* 28 U.S.C. §§ 2254(d)(2) and (e)(1) (current law).

While this new standard is demanding, this Court has not had an opportunity to articulate how it is different from the former statute. However, some of the Circuits have. The Ninth Circuit has agreed with the Seventh Circuit, holding that a key difference between the current habeas corpus law and its predecessor is that the former law seemed to require an evidentiary hearing for a factual finding to be entitled to deference, while the current law does not. *Buckley v. Terhune*, 397 F.3d 1149, 1157 (9th Cir. 2005); *Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000). The Fifth Circuit apparently agrees as well. *Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001).

Such inter-circuit unity is not as apparent in addressing how the new 28 U.S.C. § 2254(d)(2) interacts with 28 U.S.C. § 2254(e)(1), however. Three separate approaches have arisen.[9] Unfortunately, the one chosen by the Ninth Circuit frustrates the intent behind the AEDPA and the deference federal law gives to state court proceedings.

The first approach is that taken by the Fifth Circuit in *Valdez*. Under the *Valdez* approach, the district court must evaluate the individual facts for correctness under 28 U.S.C. § 2254(e)(1) and then determine, under 28 U.S.C. § 2254(d)(2), whether the conclusion was reasonable. *Valdez*, 274 F.3d at 951 n.17. *Accord Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir. 2002).

The Ninth Circuit approach is opposite the *Valdez* approach. *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004). Under the *Taylor* approach, the state fact-finding process is reviewed first. Once the process survives that review, only then do the factual determinations enjoy the presumption of correctness. *Id.* at 999-1000.

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[9] A fourth circuit has noted that it has not yet decided whether a petitioner must prevail under both 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) in order to be entitled to relief. *Green v. Travis*, 2005 WL 1581265, n.6 (2nd Cir. July 7, 2005).

In *Taylor*, the Ninth Circuit found that because neither the state judge nor the appellate court weighed the credibility of a third witness at the suppression hearing, and because this witness (an attorney) testified in an apparently credible manner, then state fact-finding process was deficient. *Taylor*, 366 F.3d at 1009-10. *Taylor* also apparently made a determination that a police officer who testified was not credible because he threw away his notes and was not present at all relevant times. *Id.* at 1011-13.[10]

The Third Circuit has taken a middle course. *Lambert v. Blackwell*, 387 F.3d 210 (3rd Cir. 2004). *Lambert* held:

> We therefore read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries. The fundamental prerequisite to granting the writ on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. If the state court's decision based on such a determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted.

[10] Because the current case pre-dates *Taylor*, the *Taylor* approach is not cited, although it follows a very similar approach. *See Collins v. Rice*, 365 F.3d 667, 676-77 (9th Cir. 2004) (explaining the standard being followed.

> Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court and that are subsidiary to the ultimate decision. Here, section 2254(e)(1) comes into play, instructing that the state court's determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. In this inquiry, a petitioner may develop clear and convincing evidence by way of a hearing in federal court as long as he satisfies the necessary prerequisites. *See* 28 U.S.C. § 2254(e)(2). In the final analysis, however, even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2).

Id. at 235-36. *Lambert* noted the existence of both *Valdez* and *Taylor*, and held that, depending on the circumstances, 28 U.S.C. § 2254(d)(2) might be addressed first some of the time and 28 U.S.C. § 2254(e)(1) might be addressed first at other times:

> We adopt no rigid approach to habeas review of state fact-finding. In some circumstances, a federal court may wish to consider subsidiary challenges to individual fact-finding in the

> first instance applying the presumption of correctness as instructed by (e)(1). Then, after deciding these challenges, the court will view the record under (d)(2) in light of its subsidiary decisions on the individual challenges. In other instances, a federal court could conclude that even if petitioner prevailed on all of his individual factual challenges notwithstanding the (e)(1) presumption of their correctness, the remaining record might still uphold the state court's decision under the overarching standard of (d)(2). In that event, presumably the (d)(2) inquiry would come first.

Id. at 236, n.19.

The problem with the Ninth Circuit's *Taylor* approach is that it allows a federal court to find the state fact-finding deficient and then give no deference to *any* facts the state court found. Indeed, that is exactly what the Ninth Circuit did as recently as August 1 in an unpublished decision: "Because the district court properly set aside the state court's fact-finding as unreasonable under § 2254(d)(2), § 2254(e)(1)'s presumption of correctness and its clear-and-convincing standard of proof do not come into play." *Garcia v. Runnells*, 2005 WL 1799417, *2 (9th Cir. August 1, 2005).

This, of course, is anathema to the fundamental purposes behind the AEDPA. As Justice Thomas noted recently in his *Miller-El II* dissent, "The passage of time, as AEDPA requires and as this Court has held, counsels in favor of *more* deference, not less." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2351 (2005) (*Miller-El II*) (Thomas, J., dissenting).[11]

[11] Justice Thomas was joined by the Chief Justice and Justice Scalia.

Likewise, Justice Stevens noted in an earlier case:

> [28 U.S.C. § 2254(d)(2)] bolsters our conviction that federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a "mixed question" that rests on a finding of fact. AEDPA plainly sought to ensure a level of "deference to the determinations of state courts," provided those determinations did not conflict with federal law or apply federal law in an unreasonable way. H.R. Conf. Rep. No. 104-518, p. 111 (1996). Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so.

Williams v. Taylor, 529 U.S. 362, 386 (2000) (Stevens, J., concurring).[12] When Justice Stevens' observation is read *in pari materia* with Justice Thomas' views in his *Miller-El II* dissent, then the Ninth Circuit's *Taylor* analysis of the interplay between 28 U.S.C. §§ 2254(d)(2) and (e)(1) cannot withstand judicial scrutiny.

It should be noted that in the one case where this Court has addressed the interplay between §§ 2254(d) and (e)(1), the analysis started with 28 U.S.C. § 2254(e)(1) and then turned to 28 U.S.C. § 2254(d)(2). This Court stated: "The state court's assumption that the records documented

[12] This language is from the main opinion of the Court, but in a section only joined by Justices Souter, Ginsberg, and Breyer.

instances of this abuse has been shown to be incorrect by 'clear and convincing evidence,' 28 U.S.C. § 2254(e)(1), and reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' § 2254(d)(2)." *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

In contrast, the Ninth Circuit's *Taylor* analysis clearly side-stepped the clear and convincing standard of proof. More significantly, the Ninth Circuit's approach not only undermines the purposes behind the AEDPA, it also effectively undermines the pre-AEDPA line of cases dealing with deference a federal court must give to state court fact-finding—including *LaVallee, Sumner I, Marshall,* and *Hernandez*.

This Court's decisions analyzing 28 U.S.C. § 2254(d)(1) lead to the inexorable conclusion that the Ninth Circuit's approach is wrong. Both 28 U.S.C. §§ 2254 (d)(1) and (d)(2) use the word "unreasonable" as modifiers. Section (d)(1) uses "unreasonable" to modify "application of clearly established Federal law, as determined by the Supreme Court of the United States." Section (d)(2) uses "unreasonable" to modify "determination of the facts of the evidence presented in the State court proceeding."

This Court has held, "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (*citing Williams*, 529 U.S. at 409).[13]

The *Miller-El I* decision provides additional support for this conclusion. "To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively

[13] Indeed, *Taylor* itself appears to recognize that the term "unreasonable" has the same meaning in the context of its usage in both 28 U.S.C. §§ 2254(d)(1) and (d)(2). *Taylor*, 366 F.3d at 999. However, *Taylor* ultimately pays little more than lip service to the deference that the AEDPA requires.

unreasonable' in light of the record before the court." *Miller-El I*, 537 U.S. at 348. Interestingly, although *Taylor* had this Court's guidance from *Miller-El I* on how to apply factual findings under the AEDPA, the Ninth Circuit does not cite *Miller-El I*.

Miller-El I can be fairly read to support the proposition that a federal court first analyze the facts pursuant to 28 U.S.C. § 2254(e)(1). The facts that survive this scrutiny then are analyzed pursuant to 28 U.S.C. § 2254(d)(2). The Fifth Circuit clearly follows this approach. The Third Circuit is clearly faithful to this approach. The Ninth Circuit clearly does not follow this approach.

This leads to the current case before this Court. *Miller-El II* left no doubt that a *Batson* claim can definitely succeed in federal habeas corpus given a particularly egregious set of facts.

In *Miller-El II*, this Court articulated the standard it was following in reaching the *Batson* claim, by initially noting that "a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El II*, 125 S.Ct. at 2325 (*quoting Batson*, 476 U.S. at 96-97). *Miller-El II* also stated the standard for review as follows:

> Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence." § 2254(e)(1). The standard is

> demanding but not insatiable; as we said the last time this case was here, "[d]eference does not by definition preclude relief."

Miller-El II, 125 S.Ct. at 2325 (*quoting Miller-El I*, 537 U.S. at 340).[14] In *Miller-El II*, this Court found no coincidence that out of twenty prospective black jurors, ten were struck for cause, nine were struck by peremptory challenge, and only one served. *Id.* This Court also found "more powerful" the evidence showing that the prosecutor treated differently black and white prospective jurors with similar attributes. *Id.* at 2325-26.

Equally significant, the prosecutor's stated reason for striking one black juror was in direct contradiction to that juror's testimony. *Miller-El II*, 125 S.Ct. at 2327. Other explanations seemed similarly implausible. *Id.* at 2327-28; 2329-30. *Miller-El II* also noted:

> It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.

Miller-El II, 125 S.Ct. at 2332 (citation omitted).

The Court looked at other evidence, including the "past practice" of the Dallas County District Attorney, the use of "jury shuffling," and how the prosecution questioned prospective black and white jurors, including the use of a "graphic script." 125 S.Ct. at 2332-37. Finally, the Court found evidence that the prosecution used a 20-year old manual that included listing prospective jurors by race. *Id.* at 2339-40.

This contrasts sharply with what happened in the current case. According to the Ninth Circuit's majority opinion, the majority saw purposeful discrimination in the following factors:

> There is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race—evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

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[14] This standard also seems antithetical to the Ninth Circuit's *Taylor* standard.

Collins, 366 F.3d at 684-85 (footnote omitted). Additionally, the *Collins* majority found:

> The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justifications that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins's claim of pretext, however, is supported by the record—the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record ... indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

Id. at 685 (footnote omitted).

However, these findings do not stand up to scrutiny, as Judge Hall's able dissent demonstrates:

> Both the trial judge and defense counsel clearly indicated that they understood the prosecutor's justification for striking Juror 019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant. Under these circumstances, the majority's focus on the prosecutor's misstatement, an issue that was not briefed by the parties, is nothing short of absurd.

Id. at 688-89 (Hall, J., dissenting). Judge Hall further noted:

> The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral

> justifications, including Juror 016's demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications offered by that prosecutor. In the instant case, the trial judge rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights nothing in the record to indicate that the California Court of Appeal should have deemed this decision *clearly erroneous.*

Id. at 689 (footnote omitted).

Judge Bea, in his dissent from the denial of rehearing *en banc*, was just as forceful in denouncing the majority's re-weighing of the prosecutor's credibility. "In reversing this determination on the habeas petition, the majority opinion demeans demeanor evidence and nitpicks the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion. Instead of reviewing the evidence for clear error the majority conducted a de novo review in this case." *Collins*, 365 F.3d at 671 (Bea, J., dissenting from denial of rehearing *en banc*).

The *Collins* majority made two crucial errors, both related to their application of 28 U.S.C. § 2254(e)(1) and § 2254(d)(2). First, although *Taylor* is not cited, the *Collins* majority examines a result it does not like and concludes that

the petitioner is entitled to relief because there was an unreasonable application of the facts.[15] Second, even though the state court fact-finding is clothed in a presumption of correctness—including a state court's determination of a prosecutor's credibility—the *Collins* majority gives little more than lip service to the habeas statute or even this Court's non-habeas corollaries to *Batson*. *See Hernandez*, 500 U.S. at 364 (even on direct review, state court's credibility determination entitled to "great deference").

The California Court of Appeal found that the trial court "was satisfied" that the prosecutor excused Juror 19 because the juror had a family member with drug problems. *Appendix to Petition for Writ of Certiorari 113.* The Court of Appeal further found that the prosecutor had properly used age as a factor in his peremptory challenge for Juror 16 and observed that the trial court was willing to give the prosecutor "the benefit of the doubt" with respect to the explanation that Juror 16 rolled her eyes. *Appendix 115-17.*

Under the Third Circuit's *Lambert* approach, which Amici endorse, Collins has not shown clear-and-convincing evidence to overcome the presumption of correctness 28 U.S.C. § 2254(e)(1) affords state court factual findings. Indeed, there was no federal court hearing to rebut these factual findings at all.

Similarly, there was nothing "objectively unreasonable" in the way the state courts applied the facts in this case. Thus, Collins does not satisfy 28 U.S.C. § 2254(d)(2), either.

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[15] This, of course, is unremarkable, since *Taylor* post-dates *Collins*. However, since Amici are urging this Court to adopt a uniform national standard for applying 28 U.S.C. §§ 2254(d)(2) and (e)(1), the temporal relationship between and *Taylor* and *Collins* is ultimately irrelevant.

CONCLUSION

This Court should take the opportunity to fully address the tension between 28 U.S.C. §§ 2254(d)(2) and (e)(1). Amici urge this Court to adopt an approach similar to that adopted by the Third Circuit because it promotes both comity and federalism between state and federal courts. Congress has shown its respect to both comity and federalism through the enactment of the AEDPA. This Court has shown its respect in the evolution of its habeas corpus decisions. Only the Ninth Circuit has rejected the requirements of the AEDPA and the jurisprudence of this Court to arrive at its own standard of review in federal habeas corpus matters. Because the Court of Appeals used an improper standard in granting Collins habeas corpus relief, its judgment must be reversed.[16]

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[16] The State of Texas urges this Court to adopt the Fifth Circuit approach, but otherwise joins this brief in support of the Petitioners.

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No. 04-52

IN THE

Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

vs.

STEVEN MARTELL COLLINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1) What is the appropriate level of deference for a reviewing court to give the trial court's finding in a *Batson* hearing that the prosecutor's explanation for peremptory challenge is credible?

2) How does the deference standard for trial court decisions in *Batson* relate to the deference standards found in 28 U. S. C. §§ 2254(d)(2) and (e)(1)?

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IN THE

Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

vs.

STEVEN MARTELL COLLINS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Batson v. *Kentucky* can create considerable pressure on the peremptory challenge and the criminal justice system, which excessive federal habeas scrutiny can only exacerbate. *Batson* and the Antiterrorism and Effective Death Penalty Act of 1996

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

both carry substantial protections for state criminal justice systems in the form of deferential standards of review. The Ninth Circuit's decision in the present case effectively ignored or eviscerated these standards, which is contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Collins was convicted by a jury of possession of rock cocaine. See *People* v. *Collins*, No. B106939 (Cal. App., Dec. 12, 1997), App. to Pet. for Cert. 109; Cal. Health & Safety Code § 11350(a). The jury also found that he had two prior serious or violent felony convictions, and he was sentenced to 25 years to life under California's "three strikes" law. App. to Pet. for Cert. 109-110. At a traffic stop, a police officer discovered that Collins had an outstanding arrest warrant, and the officer then found the cocaine on Collins in a search incident to the arrest. See *id.*, at 110. Collins moved to strike his prior convictions in the interests of justice, but the trial court denied the motion, noting that he had been almost continuously in prison or on parole since 1982. See *id.*, at 111-112.

Collins also moved that prosecutor exercised his peremptory challenges in a discriminatory manner against black prospective jurors. *Id.*, at 112-113.[2] The motion was made

2. The motion was made under the California Supreme Court decision banning discriminatory peremptory challenges, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), rather than *Batson* v. *Kentucky*, 476 U. S. 79 (1986). See App. to Pet. for Cert. 112. California courts have applied *Wheeler* in a manner that has since been disapproved by this Court as to *Batson*'s first stage. See *Johnson* v. *California*, 545 U. S. __, 162 L. Ed. 2d 129, 138, 125 S. Ct. 2410, 2416 (2005). Since the trial court found that Collins had proven a prima facie case of discrimination and required the prosecution to justify the challenges, and ruled on whether they were discriminatory, see App. to Pet. for Cert. 113-114, any error at *Batson*'s first stage is moot. See *Hernandez* v. *New York*, 500 U. S. 352, 359 (1991) (plurality). There is no claim that the California procedure is inconsistent with *Batson*'s second and third stages. Therefore, *amicus* will refer to Collins' motion as a *Batson* motion.

after the prosecution exercised peremptory challenges against two black prospective jurors, numbers 016 and 019. See *id.*, at 113. The trial court found that a prima facie case had been made and asked the prosecutor to justify the challenges.

> "The prosecutor responded both prospective jurors were 'young and I was con[c]erned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remar[k] when the judge made a response to her comment "Uh-huh," she turned away and rolled her eyes. [¶] I don't think you asked her specifically to give a yes or no, but she went "yes" and rolled her eyes and turned away from the court. [¶] She and Mr. 006 [another prospective juror the prosecutor had excused] were both single, no ties.'
>
> "As to prospective juror no. 019 the prosecutor stated, 'she also had a daughter having a drug problem and sh[e] talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.' " *Ibid.*

The prosecutor also noted that two black jurors remained on the panel. *Ibid.* The trial court denied Collins' motion, holding that it was satisfied with the explanation for juror 019, namely the family drug problem and while it did not personally observe the demeanor of juror 016, "[t]he court is prepared to give the district attorney the benefit of the doubt . . . ." *Id.*, at 113-114.

Collins appealed his conviction and sentence. The California Court of Appeal applied California precedent that the prosecution's use of peremptory challenges is presumptively constitutional, and that it gave "great deference to the trial court in distinguishing bona fide reasons from sham excuses." *Id.*, at 115. The California Court of Appeal upheld the trial court's

denial of the *Wheeler* motion, see *id.*, at 116-117, and affirmed Collins' conviction and sentence. See *id.*, at 119-120. The California Supreme Court denied Collins' petitions for review and habeas corpus. See *Collins* v. *Rice*, 365 F. 3d 667, 673 (CA9 2004).

Collins filed a federal habeas petition, which was denied by the District Court. See App. to Pet. for Cert. 93-94. The Ninth Circuit reversed. It held that a finding of no discrimination under *Batson* was an issue of fact to be reviewed under 28 U. S. C. §§ 2254(d)(2) and (e)(1). See *Collins* v. *Rice*, 365 F. 3d, at 677. The Ninth Circuit found no error in the California Court of Appeal's decision with respect to *Batson*'s second stage, see *id.*, at 678, but came to a different conclusion with regard to the ultimate outcome of the case.

The Ninth Circuit found the decision of the California Court of Appeal to uphold the finding of no jury discrimination to be objectively unreasonable. See *Collins*, 365 F. 3d, at 673. It examined the record and found reasons to contradict the prosecution's justifications for challenging juror 016, utilizing very detailed factual analysis. See *id.*, at 679-685. The court also concluded that upholding the trial court's ruling that the prosecutor was credible was an "unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking juror 016." *Id.*, at 683. It then held that Collins met the "heavy burden" of proving by clear and convincing evidence error under § 2254(e)(1). See *id.*, at 685.

This Court granted certiorari on June 28, 2005.

SUMMARY OF ARGUMENT

Although necessary to the Constitution's guarantee of equal protection under the law, *Batson* v. *Kentucky* creates several problems for the criminal justice system. Because it requires courts to determine the subjective intent of the person making the peremptory challenge, it is difficult to administer. Also,

there is an inherent tension between the peremptory challenge and *Batson*'s requirement that counsel justify the challenge. Finally, *Batson* operates like the Fourth Amendment's exclusionary rule or *Miranda*, reversing convictions obtained from otherwise fair trials in order to advance other interests of society. This places a premium on accurate analysis of *Batson* hearings on appeal.

The best solution to these problems is to delegate most of the authority for *Batson*'s enforcement to the trial court. The focus of the *Batson* hearing is the prosecutor's justification for the peremptory challenge, which is primarily a credibility question. Since the trial court is in a much better position to judge counsel's credibility than any reviewing court, it makes sense to defer to the trial court's evaluation, which was done in *Hernandez* v. *New York*. Applied properly, *Hernandez*'s clear error standard will eliminate most of the work of appellate and habeas courts for denials of claims at *Batson*'s third stage. While third-stage post-trial reversals are possible, reversal will require unusual circumstances such as those found in *Miller-El* v. *Dretke*.

The Ninth Circuit did not accord the proper deference to the trial court's ruling. A federal habeas court's analysis of the California Court of Appeal's decision is made under the § 2254(d)(2) standard. That analysis determines whether the state appellate court reasonably applied *Hernandez*'s deferential standard to the trial court's decision. Throughout this process, any fact found by any state court is presumed correct under § 2254(e)(2).

The California Court of Appeal's decision is not only reasonable under § 2254(d)(2), it is also correct. Although this Court usually does not analyze the correctness of a state court ruling under § 2254(d), "right" is by definition reasonable. The trial court's conclusion that the prosecutor did not intend to discriminate was not clearly erroneous. The reasons given for the challenges were facially neutral. Under the circumstances

of the case, believing that the prosecutor was credible was a permissible interpretation of the evidence at hand.

ARGUMENT

I. The trial court is *Batson*'s gatekeeper.

A. Batson's Problems.

1. Subjectivity.

Batson v. *Kentucky*, 476 U. S. 79 (1986) is an unusual decision. While this Court had long held that racial discrimination in jury selection violated the Equal Protection Clause, see *id.*, at 84, and n. 3, *Batson* substantially changed the scope of the inquiry. Prior jury discrimination decisions typically addressed relatively overt forms of discrimination. The first jury discrimination case addressed a law that explicitly limited jury service to whites. See *Strauder* v. *West Virginia*, 100 U. S. 303, 305 (1880). Other cases also involved similarly obvious discrimination. See, *e.g.*, *Pierre* v. *Louisiana*, 306 U. S. 354, 355 (1939) (no blacks on venire even though one-third of the population); *Avery* v. *Georgia*, 345 U. S. 559, 560-561 (1953) (no blacks on venire, venire drawn from tickets in a box with whites and blacks assigned different colored tickets); *Vasquez* v. *Hillery*, 474 U. S. 254, 258-259 (1986) (no blacks on grand jury in the history of the county). Similarly, this Court's first effort to regulate discriminatory peremptory challenges was limited to systematic discrimination over many trials, rather than the use of peremptories at a single trial that demonstrate a clear pattern of discrimination. See *Swain* v. *Alabama*, 380 U. S. 202, 222-223 (1965).

The *Batson* Court recognized that *Swain* was insufficient to combat discriminatory peremptory challenges. That decision created an unacceptably "crippling burden of proof" which compromised efforts to prevent discriminatory peremptory challenges. See 476 U. S., at 92. While *Batson* provides more

protection for equal protection rights than *Swain*, it raises a new set of problems for the courts.

Batson differs most from *Swain* by allowing discrimination to be inferred from much less overt conduct. Instead of requiring repeated discrimination over several cases, discrimination can be proven simply from the prosecution's exercise of peremptory challenges at trial. *Batson*, 476 U. S., at 96. Direct evidence of discrimination is not necessary to make a prima facie case under *Batson*. Instead, the defendant can rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate' " *Ibid.* (quoting *Avery* v. *Georgia*, 345 U. S., at 362). The defense may use this and any other relevant circumstances "to raise an inference" of discrimination. See *ibid.*

Batson considerably expanded the definition of what was jury discrimination, and substantially eased its proof. For example, the defendant does not have to prove discrimination by a preponderance of the evidence in order to establish a prima facie case. *Johnson* v. *California*, 545 U. S. __, 162 L. Ed. 2d 129, 138, 125 S. Ct. 2410, 2416 (2005). The fact that a minority actually serves on the jury does not necessarily prevent a prima facie case or a successful *Batson* claim. See *Miller-El* v. *Dretke*, 545 U. S. __, 162 L. Ed. 2d 196, 214, 125 S. Ct. 2317, 2325 (2005) ("*Miller-El II*"). Compared to *Swain*'s high standard, *Batson* considerably expanded the avenue for raising equal protection claims.

Attorneys are now much more likely to have to justify the exercise of peremptory challenges in court. This raises the inevitable problem of forcing counsel to explain that which is not meant to be explained. Peremptory challenges are not supposed to be capable of ready rationalization. At common law, peremptory challenges were labeled as "an arbitrary and capricious species of challenge . . . ." 4 W. Blackstone, Commentaries 346 (1st ed. 1769). Similarly, it has been described as the right to "peremptorily challenge 'on his own

dislike without showing any cause'; [the defendant] may exercise that right without reason or for no reason, arbitrarily and capriciously." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (quoting 1 E. Coke, Institutes 156b (19th ed. 1832)).

The peremptory challenge has not changed. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U. S., at 220. Jury selection is more art than science, and the psychology of bias is at best inexact. While *voir dire* can help provide a foundation for uncovering bias in some cases, effective use of the peremptory challenge often hinges on rationales that cannot be explained with any precision. "Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's ' "bare looks and gestures." ' " *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148 (1994) (O'Connor, J., concurring) (quoting *Swain*, *supra*, at 220). The fact that a challenge is based on a hunch does not make it a pretext for discrimination. Nonverbal cues can reveal a juror's attitude as much as verbal responses. See V. Starr & M. McCormick, Jury Selection 445-446 (3d ed. 2001). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *J. E. B.*, *supra*, at 148 (O'Connor, J., concurring).

Once a prima facie case is made, *Batson* requires an inquiry into the motives of the attorney making the challenge. Courts must determine whether the peremptory challenge was motivated by a discriminatory purpose, an inquiry that contains "inherent uncertainty." See *Johnson*, 162 L. Ed. 2d, at 140, 125 S. Ct., at 2418. The uncertainty stems from the need to ascertain often difficult to articulate motives. "Intent is a subjective state, illusory and difficult to establish in absence of

voluntary confession." *Knauer* v. *United States*, 328 U. S. 654, 659 (1946). The difficulty of determining motive, intent, or other subjective belief is reflected in the rejection of these factors in other areas such as the Fourth Amendment, see *Whren* v. *United States*, 517 U. S. 806, 812-813 (1996), or *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *New York* v. *Quarles*, 467 U. S. 649, 656 (1984). "In general, 'we believe that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." ' " *Missouri* v. *Seibert*, 542 U. S. 600, 159 L. Ed. 2d 643, 664, 124 S. Ct. 2601, 2618 (2004) (O'Connor, J., concurring) (quoting *United States* v. *Leon*, 486 U. S. 897, 922, n. 23 (1984), in turn quoting *Massachusetts* v. *Painten*, 389 U. S. 560, 565 (1968) (*per curiam*) (White, J., dissenting)).

Unlike other parts of the law, subjective intent is a necessary part of equal protection analysis. See *Whren*, 517 U. S., at 813. The fact that the Constitution requires this type of inquiry does not lessen its difficulty. This problem is compounded by the tension between the peremptory challenge and the need for its justification under *Batson*. Peremptory challenges are vulnerable to explanation. Since it is their nature not to have readily articulated reasons for their exercise, requiring too many reasons may undercut peremptory challenges, destroying their utility. "But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable." *J. E. B.*, 511 U. S., at 148 (O'Connor, J., concurring).

2. Windfall.

Another difficulty with *Batson* is the apparent windfall that it can give to some lucky criminal defendants. While *Batson* protects essential constitutional values, it is no less true that it has less to do with preserving the fairness or accuracy of the trial than with advancing other values. Although the petit jury must be drawn from a pool that is a fair cross section of the

community, see *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975), there is no right to have the petit jury itself be similarly representative. See *Holland* v. *Illinois*, 493 U. S. 474, 478 (1990). Although the exclusion of a juror because of his or her race tends to rob the trial of the appearance of fairness and saps public confidence in the judicial system, *Batson* is premised on the principle that one's race is irrelevant to one's fitness as a juror. See 476 U. S., at 87 (quoting *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 223-224 (1946) (Frankfurter, J., concurring)); accord *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). Using race as a proxy for attitude or potential bias is contrary to the "dispassionate analysis" that is the hallmark of the law. *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 631 (1991). The race-based peremptory challenge "derives from open hostility or from some hidden and unarticulated fear . . . ." *Ibid.* While racially discriminatory challenges can compromise the fairness of the verdict in racially charged circumstances, in most cases *Batson* error does not prevent a jury from reaching an unbiased verdict.

Constitutional error is harmless in a criminal case if the prosecution can prove beyond a reasonable doubt that the error "did not contribute to the verdict obtained," *Chapman* v. *California*, 386 U. S. 18, 24 (1967). Since the particular racial composition of the jury is irrelevant to its verdict, *Batson* error would appear to meet the standard of harmlessness in most, if not all, cases. See Muller, Solving the *Batson* Paradox: Harmless Error, Jury Representation and the Sixth Amendment, 106 Yale L. J. 93, 118 (1996). This is incorrect, as *Batson* is structural error. However, it does highlight that appellate reversal of a conviction for *Batson* error provides a type of windfall to the defendant.

The defendant is more of an incidental beneficiary of the *Batson* rule. *Batson*'s breadth demonstrates that the real beneficiaries of its rule are society and jurors. A *Batson* claim can be raised even if the defendant and the potential juror are not of the same race. See *Powers* v. *Ohio*, 499 U. S., at 416.

Also, *Batson* applies to civil cases, see *Edmonson*, 500 U. S., at 616, and to challenges by criminal defense counsel. See *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992). While a *Batson* violation by the prosecution does some harm to the criminal defendant, see *Batson*, 476 U. S., at 86, it is difficult to quantify the damage. The damage to the excluded jurors and society from discriminatory peremptory challenges is much more tangible. It directly discriminates against the excluded juror, see *Batson*, *supra*, at 87, and has caused real damage to society. See *McCollum*, *supra*, at 49-50.

Since it is too expensive for an individual juror to enforce his or her equal protection rights through litigation, *Batson* allows the parties to protect the jurors' rights. See *id.*, at 56. This is similar to the Fourth Amendment exclusionary rule, which allows criminal defendants to protect Fourth Amendment rights that could not be protected through other remedies, see *Mapp* v. *Ohio*, 367 U. S. 643, 652-653 (1961), in spite of the cost to society of lost convictions. See *Nix* v. *Williams*, 467 U. S. 431, 447-448 (1984).

This system operates well at trial. A successful *Batson* motion at trial is not particularly costly to society, as the typical remedy is either to disallow the peremptory challenge and place the challenged person on the jury, or to dismiss the entire venire. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 22.3(d), p. 335 (2d ed. 1999). The real problem is with *Batson* reversals on appeal or habeas. While *Batson* error must lead to reversal, it often reverses the results of fair trials that led to the conviction of clearly guilty defendants. Since the prosecution has a very limited ability to appeal an improper refusal to grant a *Batson* motion against the defense, see *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145-146 (1986) (cannot appeal acquittals), *Batson*'s unfairness is one-sided. While this is a cost society must bear in order to uphold the mandate of the Equal Protection Clause, the balance of equities should still influence post-trial review of *Batson* claims. Courts should make every effort to minimize inaccurate grants of *Batson*

claims on appellate review. Fortunately, there are already mechanisms in place that can minimize defendant windfalls, while protecting the equal protection interests of jurors and society. Unfortunately, the Ninth Circuit did not properly implement these procedures in this case.

B. The Trial Court Solution.

Batson's two problems, the difficulty in evaluating the prosecutor's justification for the challenge, and the need for accurate appellate review, are best addressed by delegating primary authority to the trial courts to determine whether the peremptory challenge was in fact motivated by an intent to discriminate. While there is a role for appellate and collateral review of *Batson* claims, it is necessarily small. The trial courts are the real guardians of *Batson*.

This role was assigned to the trial courts by the plurality in *Hernandez* v. *New York*, 500 U. S. 352 (1991). The plurality recognized that once a prima facie case of discrimination is made, *Batson* centers on the credibility of the prosecutor. In *Hernandez*, the defendant argued for " 'independent' " appellate review of a trial court's rejection of a *Batson* claim. *Id.*, at 366-367. This argument was rejected in language affirming the primacy of the trial court in *Batson* procedure. "But if an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenge should be believed, we fail to see how the appellate court nevertheless could find discrimination. *The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis*, and once that has been settled there seems nothing left to review." *Id.*, at 367 (emphasis added).

Although the lead opinion in *Hernandez* was a plurality, the concurrence agreed with the plurality on the standard of deference for the trial court's findings at *Batson*'s third stage. See *id.*, at 372 (O'Connor, J., concurring) ("I agree with the plurality that we review for clear error the trial court's findings as to discriminatory intent, and agree with its analysis of this

issue"). The concurrence was the broader of the two opinions concurring in the result in *Hernandez*, holding that the plurality required too high a level of justification from the prosecutor, even though both the plurality and the concurrence upheld the peremptory challenges against the *Batson* challenge. See *id.*, at 375. Because the two opinions do not differ on the clear error standard, the plurality opinion can be taken as the definitive statement of the law.

Credibility is an issue best left to the trial courts. A question of credibility is "largely one of demeanor." *Patton* v. *Yount*, 467 U. S. 1025, 1038 (1984). The only court that can make this observation is the trial court, which gives its credibility determinations "special deference" from any reviewing court. See *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U. S. 485, 499-500 (1984). Therefore, even among the set of trial court rulings to which appellate courts must defer, credibility findings stand out as being particularly difficult to overturn. "The requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Ibid.*

The *Hernandez* plurality's decision to give the same deference to the trial court's handling of the prosecutor's reasons for the peremptory challenges is the best way to address *Batson*'s problems. *Batson*'s problems center on the justification for the peremptory challenge. The requirement that the challenged peremptories must be justified gives *Batson* much of its subjectivity, see *supra* 8-9, and helps to foster the tension between *Batson* and the peremptory challenge. See Part I-A-1, *supra*. Since *Batson* is primarily a credibility question once the prima facie case is made, the case for relying on the trial court is further strengthened, making the trial court *Batson*'s gatekeeper.

Deferring to the trial court minimizes the risk of improper reversals on appeal. Given the importance of accurate appellate

implementation of *Batson*, see Part I-A-2, *supra*, this is particularly important. The *Hernandez* plurality's decision recognizes that the trial court has more means of determining the prosecutor's credibility than any reviewing court. See 500 U. S., at 365. It held that the trial court's factfinding on the issue of discriminatory intent will not be overturned unless it is "convinced that its determination was clearly erroneous." *Id.*, at 369. The plurality's approach was adopted by a majority of the Court. See *id.*, at 372 (O'Connor, J., concurring in the judgment). The *Batson* decision also recognized that the trial court was owed great deference, since *Batson* was primarily a credibility question. See 476 U. S., at 98, n. 21. Properly applied, the *Hernandez* standard substantially reduces the role of appellate and habeas courts in enforcing *Batson*. This will minimize *Batson*'s costs, while retaining its benefits.

C. Applying the Deference Standard.

The role of appellate and habeas courts in *Batson* is a function of when the *Batson* inquiry was terminated at trial. At *Batson*'s first step, the trial court will either reject or accept that the defense has established a prima facie case. If the trial court finds no prima facie case, then the defendant may appeal if convicted. There is less need for any special deference in this type of appeal, since the existence of a prima facie case does not involve any credibility questions. If the trial court finds a prima facie case and proceeds to *Batson*'s second and third stages, then the issue of the existence of a prima facie case is mooted. See *Hernandez*, 500 U. S., at 359 (plurality). *Batson*'s second stage, the prosecutor's explanation, see 476 U. S., at 97, should not generate any appellate or habeas review, because this stage is simply a precursor to the third. If the prosecution gives a race-neutral explanation, then the trial court must proceed to *Batson*'s third stage, see *id.*, at 98, but *Johnson* implies that the trial court must also proceed to the third stage even if the prosecution fails to provide a race-neutral explanation. See 162 L. Ed. 2d, at 140, n. 6, 125 S. Ct. 2410, 2417-2418, n. 6. *Batson*'s first two steps simply govern the production of evidence for *Batson*'s critical third stage. See *id.*, at 140, 162 L. Ed. 2d, at 2417-2418.

At *Batson*'s third stage there will be very limited review. If the trial court finds discrimination and grants the defendant's *Batson* motion, then the prosecution will generally have no effective appeal. A conviction moots any *Batson* error, while double jeopardy prevents appeal from an acquittal. See *Smalis*, 476 U. S., at 145-146. An interlocutory appeal or extraordinary writ might be available, but only at a major cost in trial delay. If the trial court rejects the *Batson* motion, then *Hernandez*'s deference standard substantially limits the scope of review.

The third stage resolves *Batson*'s key issue, whether the peremptory challenges were motivated by purposeful discrimination. See *Batson*, 476 U. S., at 98. This is usually decided by whether the trial court believes the prosecutor's reason for the peremptory challenge. See *id.*, at 98, n. 21 ("largely turn on evaluation of credibility"). If the trial court believes the prosecutor, then it will deny the *Batson* motion, and the deference standard will limit review to clear error. See *Hernandez*, 500 U. S., at 364-365 (plurality). It is possible that the *Batson* motion will fail even if the prosecutor gives an implausible reason. Since the defense carries the ultimate burden of proving discriminatory intent, failure to provide a plausible reason does not end the *Batson* inquiry at the second stage. See *Johnson*, 162 L. Ed. 2d, at 139-140, and n. 6, 125 S. Ct., at 2417-2418, and n. 6. However, since an insufficient reason for the peremptory challenge is evidence of discrimination, *Purkett* v. *Elem*, 514 U. S. 765, 767-768 (1995) (*per curiam*), it is very likely that a justification that is not believed by the trial court will lead to the *Batson* motion being granted. Since *Batson* will usually center on the credibility of the prosecutor's explanation, the trial court's decision is not likely to be overturned.

D. Batson and Diminished Review.

The fact that review of the trial court's resolution of *Batson* claims is diminished does not turn *Batson* into a dead letter. Appellate and habeas courts have ample opportunity to review dismissals of *Batson* claims for failing to make a prima facie case. See Part I-C, *supra*. While review of *Batson* denials is substantially limited, it is not completely foreclosed, as *Miller-El* v. *Dretke*, 545 U. S. __, 162 L. Ed. 2d 196, 125 S. Ct. 2317 (2005) demonstrates. Although *Miller-El II* shows that a trial's third stage ruling can be overturned, this does not diminish *Hernandez* as precedent. *Miller-El II* must be read in the context of its unusual facts.

Miller-El I. is unusual because the trial court's advantage in evaluating the peremptory challenges, relative to the appellate or habeas courts, was diminished. See K. Bowling, Note, *Miller-El* v. *Cockrell*: Procedural Rules to Protect Prisoners' Rights, 35 U. Toledo L. Rev. 723, 749 (2004). While Miller-El was tried before *Batson* was decided, *Batson* retroactively applied to his jury discrimination claim. See *Miller-El* v. *Cockrell*, 537 U. S. 322, 328 (2003) ("*Miller-El I*"). The Texas Court of Criminal Appeals remanded the case to the trial court for a *Batson* hearing that took place "a little over two years after [Miller-El's] jury had been empaneled." *Id.*, at 329. Therefore the trial court had some of the same problems with judging of the prosecution's reasons for the peremptory challenge credibility as the appellate and habeas courts. See *id.*, at 343.

Since the trial court had less special competency to make credibility findings, there was less need to defer to its conclusions. This Court relied on that fact in the *Miller-El II* decision, see 162 L. Ed. 2d, at 214, n. 1, 125 S. Ct., at 2326, n. 1, and interpretations of *Miller-El II* must be made in that context. Deprived of the most probative evidence of whether the prosecutor had discriminatory intent, the *Miller-El II* Court turned to other sources developed at the trial and in the habeas proceedings. These sources provided overwhelming evidence

of discriminatory intent. Comparative analysis, see *id.*, at 216-217, 125 S. Ct., at 2327-2328, the remarkable number of challenged black jurors, see *id.*, at 214, 125 S. Ct., at 2325, the lack of an adequate nondiscriminatory explanation for the challenges, see *id.*, at 2330-2332, 162 L. Ed. 2d, at 220, the use of certain tactics like shuffling the venire panel to remove black jurors, see *id.*, at 2332-2333, 162 L. Ed. 2d, at 222-223, the use of trickery to get disqualifying answers from black jurors, see *id.*, at 2337-2338, 162 L. Ed. 2d, at 226-227, and decades of jury discrimination by the Dallas District Attorney's Office, including an official handbook that contained articles advocating the systematic exclusion of blacks from Dallas juries, see *id.*, at 2338-2339, 162 L. Ed. 2d, at 228-229, made for an insurmountable case that the peremptory challenges were motivated by an intent to discriminate.

Given this evidence, and the absence of any contemporaneous evaluation of the credibility of the prosecutor's reasons for the challenges, Miller-El could satisfy the clear and convincing evidence standard necessary to establish his *Batson* claim on habeas in spite of the trial court's ruling to the contrary. See *id.*, at 2339, 162 L. Ed. 2d, at 229. While some parts of the evidentiary record were open to competing interpretations, "when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Ibid.*

Fortunately, *Miller-El II*'s unusual facts should not be often repeated, since there should be few post-trial *Batson* hearings any more.[3] While less extreme circumstances could support overturning a trial court's rejection of a *Batson* claim, the evidence will have to be compelling to overturn a contemporaneous evaluation of the prosecution's discriminatory motive. This level of proof is not met in the present case.

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3. The one source of a significant number of post-trial *Batson* hearings is the disapproval of California's methodology in *Johnson*, *supra*, which will be retroactive to all cases pending on direct review.

II. The Ninth Circuit's opinion ignored the layers of deference owed to the trial court's finding that the peremptory challenges were not motivated by an intent to discriminate.

A. According Deference.

This case presents the interesting problem of how to treat a decision that is owed multiple layers of deference by the reviewing court. Since this case involves federal habeas review of a state conviction, the decision can only be overturned if the state court decision:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§ 2254(d)(1), (2).

Batson v. *Kentucky*, 476 U. S. 79 (1986) is a fact-bound decision. The question of whether the peremptory challenge was the product of intentional discrimination usually revolves around the credibility of the prosecutor's reason for the challenge. See *supra*, at 12. Whether the prosecution intended to discriminate is thus a question of fact. See *Hernandez* v. *New York*, 500 U. S. 352, 367 (1991) (plurality); *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (2003) ("*Miller-El I*"). In addition to § 2254(d)(2)'s deference on facts, the trial court's decision with regard to the jury discrimination claim is also subject to the presumption of correctness of 28 U. S. C. § 2254(e)(1). See *Miller-El I*, *supra*, at 340.

While this situation was present in the second *Miller-El* case, see *Miller-El* v. *Dretke*, 545 U. S. __, 162 L. Ed. 2d 196, 125 S. Ct. 2137 (2005) ("*Miller-El II*"), that decision has limited relevance to the present case because of its unusual facts. Since the trial court did not make any credibility findings

until more than two years after the peremptory challenges were made, there was less reason to give any special credibility to its finding of no discrimination. See *supra*, at 16-17. In the present case, the trial court followed normal *Batson* procedure and made its decision after observing the prosecutor's reasons for the peremptory challenge. See *supra*, at 3-4. This is the classic *Batson* credibility finding, and it is subject to the clearly erroneous standard first announced in *Hernandez*. This Court will have to sort out these multiple levels of deference.

A qualified immunity decision provides a useful reference for sorting out more than one level of deference. *Saucier* v. *Katz*, 533 U. S. 194 (2001) addressed a case involving both the Fourth Amendment standard for excessive force in an arrest and the qualified immunity defense. See *id.*, at 197. The two concepts articulate very similar standards. The Fourth Amendment standard for excessive force is whether the use of force in that particular circumstance was objectively reasonable, see *id.*, at 201-202; *Graham* v. *Connor*, 490 U. S. 386, 396 (1989), and qualified immunity also relies on the objective reasonableness of the government official. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818-819 (1982); *Anderson* v. *Creighton*, 483 U. S. 635, 640-641 (1987). The Ninth Circuit found that the reasonableness inquiries of the standards were the same, since both evaluated the reasonableness of the officer's conduct. See *Katz* v. *United States*, 194 F. 3d 962, 968 (CA9 1999). It concluded that immunity would not be granted unless the court could find that as a matter of law that use of force was objectively reasonable. See *id.*, at 969.

This Court reversed. See *Saucier*, 533 U. S., at 197. A court cannot simply avoid qualified immunity, as the issue of immunity must be addressed at the earliest part of the litigation possible. See *id.*, at 200-201. While reasonableness marks the boundary of legal force under the Fourth Amendment, the vagueness of that definition means that police officers will occasionally make mistakes as to where the boundary lies. The immunity standard adds an additional buffer zone around the

Fourth Amendment limit. See *id.*, at 204-205. "The same analysis is applicable in excessive force cases [as other Fourth Amendment cases], where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable." *Id.*, at 206.

Similar respect must be paid to the varying and multilayered standards of deference found in this case. Although there is much more difference between the terminology used in the *Hernandez* standard, § 2254(d)(2), and § 2254(e)(1), than the relatively small differences between qualified immunity and excessive force, this did not prevent the Ninth Circuit from failing to apply the proper deference to the trial court's decision. It effectively ignored the *Hernandez* standard of deference for the trial court's decisions under *Batson* and all but eviscerated the AEDPA's deference standards. Before these mistakes can be resolved, it is necessary to sort out the various deference standards and how they apply to this case.

B. Sorting the Standards.

1. The habeas provisions.

The first relationship to sort out is that among the habeas provisions. Section 2254(e)(1) is a relatively simple deference standard that protects facts found by state courts with a "presumption of correctness." The language chosen by Congress indicates an intent to give state court factfinding substantial protection from federal habeas courts. The use of the "clear and convincing" standard in 2254(e)(1) indicates that a strong presumption of correctness attaches to state court factfinding on federal habeas. If a fact is not at issue, then there is no need for (e)(1), but when the correctness of "a determination of a factual issue made by the state court" is questioned by petitioner or the habeas court, then (e)(1)'s presumption applies.

Section 2254(d)(2) also mixes concepts found in both (e)(1) and (d)(1). Like (e)(1), (d)(2) protects facts, yet like (d)(1), (d)(2) protects decisions through a reasonableness standard. Understanding this provision requires an examination of (d)(2)'s relationship to (d)(1) and (e)(1). First, it is necessary to sort out the differences between (d)(2) and (e)(1). The provisions differ in two ways. While (e)(1) protects factual issues determined in state court, (d)(2) addresses decisions based upon unreasonably determined facts. Also, (d)(2) contains a time component, "in light of the evidence presented in the State Court proceeding," that is not present in (e)(1). These differences allow the two provisions to operate separately.

Section 2254(d)(2) qualifies the general prohibition against the use of federal habeas to overturn state convictions found in § 2254(d). This qualification of 2254(d) is in turn qualified by § 2254(e)(1). While habeas relief will be granted for decisions based upon an unreasonable determination of the facts at hand, those facts are presumptively correct unless rebutted by clear and convincing evidence, limited to what was before the state court when it made its decision. This Court has noted that the two provisions operate together. See *Miller-El II*, 162 L. Ed. 2d, at 214, 125 S. Ct., at 2325. There is no reason to depart from this synthesis of the two standards.

This Court has not made any substantial effort to separate (d)(2) and (e)(1). When there is a problem with the state court's use of facts, this Court typically reads the two provisions in conjunction, summarily finding that habeas can be granted under these standards. See, *e.g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 528 (2003); *Miller-El II*, 162 L. Ed. 2d, at 230, 125 S. Ct., at 2340. Also, this Court has found no reason to provide any additional explanation for what an "unreasonable determination of the facts" means other than simply applying the standard to the case before it. This parallels the treatment of (d)(1). In *Williams* v. *Taylor*, 529 U. S. 362 (2000), this Court held that "unreasonable application" meant objectively unrea-

sonable and did not mean incorrect. See *id.*, at 411. Other than that, this Court simply applied the standard to the case before it, just as it has done with (d)(2). Therefore, *amicus* will not attempt to provide any further explanation of (d)(2)'s standard.

The relationship between (d)(1) and (d)(2) is not particularly complicated. Where the facts are in dispute, (d)(2) is relevant. If not, then the conviction can only be overturned under (d)(1). See *Price* v. *Vincent*, 538 U. S. 634, 639-640 (2003). There is language that a state court's reliance on an unreasonable factfinding undermines the Court's faith in the reasonableness of the state court's decision under (d)(1), see *Wiggins*, 539 U. S., at 528, but the better practice is to keep the two standards separate. The present case is the type of case that (d)(2) is meant to address. It involves a finding that there was no discrimination at the third stage of the *Batson* inquiry. This is a question of fact that determines the outcome of the case, and is therefore best analyzed under (d)(2). Subdivision (d)(1) is better left for more purely legal issues under *Batson* such as whether the state court applied the appropriate test. See *Johnson* v. *California*, 545 U. S. __, 162 L. Ed. 2d 129, 125 S. Ct. 2410 (2005). Since this case only involves the trial court's finding at *Batson*'s third stage, (d)(2) and (e)(1) are the appropriate avenues for giving the conviction its proper deference.

2. Batson and habeas.

While (e)(1) and (d)(2) do protect fact-based decisions, *Batson* provides its own protection for a trial court finding that the peremptory challenge was not motivated by an intent to discriminate. *Batson*'s special deferential standard was mentioned in the habeas context in *Miller-El I*, 537 U. S., at 339-340. However, this Court did not apply it because the trial court conducted the *Batson* hearing two years after the trial. See *supra* at 16-17. If possible, *Batson*'s own standard of deference should not be lost in the mix of deferential standards that apply to habeas.

The *Miller-El I* Court noted the *Hernandez* deference standard "[i]n the context of direct review" and then also stated the deference due on habeas to state court judgments under §§ 2254(d)(2) and (e)(1). See 537 U. S., at 340. This distinction provides the key to harmonizing the various standards of deference. *Miller-El I* did not render *Hernandez* irrelevant to federal habeas. Rather, it reflected a subtle understanding of the different roles for *Hernandez* and § 2254, and how each constrains the federal habeas court.

When a federal habeas court examines the constitutionality of the petitioner's trial or sentence, it does not apply § 2254 directly to the trial court's actions. Instead, it looks to the reasonableness of the state court opinion affirming the conviction on direct or collateral review. See, *e.g.*, *Brown* v. *Payton*, 544 U. S. __, 161 L. Ed. 2d 334, 345, 125 S. Ct. 1432, 1439 (2005) (decision of California Supreme Court affirming sentence not unreasonable); *Price*, 538 U. S., at 639 (court of appeals improperly failed to apply § 2254(d) to the Michigan Supreme Court's opinion rejecting defendant's double jeopardy claim); *Wiggins*, 539 U. S., at 528 (Maryland Court of Appeals' decision unreasonable under §§ 2254(d)(1) and (d)(2)). Therefore, when this Court reviews the California Court of Appeal's denial of Collins' *Batson* claim, it applies § 2254(d)(2) to that decision. That review requires the federal habeas court to determine the objective reasonableness of the state appellate court's ruling that, under *Hernandez* or its equivalent, it could not overturn the trial court's decision to reject the jury discrimination.

Barring the unusual facts of *Miller-El II*, both *Hernandez* and § 2254 are relevant to federal habeas review of a *Batson* claim rejected at the third stage. The habeas court cannot grant relief unless it finds that the state appellate court was objectively unreasonable to hold that the trial court's finding of no discrimination was not clearly erroneous. The habeas court must also presume that every fact found in any of the state court proceedings is correct unless rebutted by clear and

convincing evidence. This high standard is inconsistent with the result reached by the Ninth Circuit.

C. Applying the Standards.

1. Right before reasonable.

In a federal habeas case, this Court usually applies § 2254's deferential standard rather than determining whether the state court decision was in fact correct. Since a state court decision can be incorrect but still reasonable under § 2254, a federal habeas court applying § 2254(d)(1) does not have to determine whether the state court's decision was correct. See *Williams*, 529 U. S., at 411. Since (d)(2) also has a reasonableness standard, it would normally apply in the same manner.

While a habeas decision does not generally require determining whether the state court decision was correct, § 2254(d) does not prevent a habeas court from holding that the state court decision was correct. If a state court decision is correct, then "it follows *a fortiori*" that it is not unreasonable or contrary to this Court's precedents, under § 2254(d)(1), see *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000), and § 2254(d)(2) should be no different.

Holding that the California Court of Appeal's decision affirming the conviction was correct rather than simply reasonable is the better option in this case. A finding that the state court decision is correct requires this Court to apply the *Hernandez* deference standard, while the reasonableness inquiry requires an examination of the *Hernandez* standard, the deferential standards of §§ 2254(d)(2) and (e)(1), and possibly § 2254(d)(1). The Ninth Circuit's decision demonstrates that the courts have problems appreciating *Hernandez*'s deference standard for the trial court's findings at *Batson*'s third stage and need more instruction from this Court.

Applying the *Hernandez* deference standard also advances many of the same interests protected by the AEDPA. Deference to a trial court's determination of jury bias is not just a

matter of deferring to the actor with the best information. It also advances finality by "preserv[ing] a trial court's integrity as a court of law, instead of as an 'entrance gate' for fact collecting subject to appellate review." *Wainwright* v. *Witt*, 469 U. S. 412, 428, n. 10 (1985). The *Witt* Court drew this from Judge Higginbottom's special concurrence in *O'Bryan* v. *Estelle*, 714 F. 2d 365, 392 (CA5 1983), calling it an artful discussion of the reasons for deferring to the trial court's decisions in that context. See 469 U. S., at 428, n. 10. The *Witt* Court also notes about Judge Higginbottom's concurrence that, "he points out that on habeas review, comity and federalism indicate the need to defer to the independent mechanisms of state government that already have reached one decision on the same facts." *Ibid.* As in the jury bias cases, the *Hernandez* standard protects comity, finality, and federalism, which are also the primary interests protected by the AEDPA. See *Duncan* v. *Walker*, 533 U. S. 167, 178 (2001).

2. Deference, credibility, and the trial court.

The trial court rejected Collins' *Batson* motion because it believed that the prosecutor's explanations for the peremptory challenges were credible. See App. to Pet. for Cert. 113-114 ("satisfied" with the explanation for juror 019 and "prepared to give the district attorney the benefit of the doubt as to" juror 016). Since the rejection of Collins' *Batson* motion turns on a credibility finding by the trial court, it can be reversed on appeal only if it is clearly erroneous. See *Hernandez*, 500 U. S., at 369 (plurality); *id.*, at 372 (O'Connor, J., concurring).

"We have said that '[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.' " *Id.*, at 369 (quoting *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985)). The majority of the Ninth Circuit panel below ignored this standard. While it paid lip service to *Hernandez*, see *Collins*, 365 F. 3d, at 679, it invented an excuse to bypass that standard, claiming that "the basis for the state appellate court's determination was its

conclusion that there was 'nothing in the present record' to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility" which constituted an unreasonable determination of the facts. See *id.*, at 683. This justified the majority's exhaustive examination of the record to come up with its own judgment of the prosecutor's credibility from a cold record, years after the *Batson* motion had been made and denied.

That is not what was meant by *Hernandez*. The trial court's decision does not have to be the product of a searching inquiry or survive rigorous analysis by the Court of Appeal. If the trial court "took a permissible view of the evidence" then its acceptance of the prosecutor's reason for the peremptory challenge must be upheld under *Hernandez*. 500 U. S., at 369 (plurality).

The trial court's decision that there was no discrimination is a permissible view of the evidence. With respect to juror 016, the reasons given, youth, demeanor to a court's comment, and a lack of ties to the community, see App. to Pet. for Cert. 113, are all facially neutral reasons that would justify a peremptory challenge. The majority below places great emphasis on the fact that the prosecution referred to the youth of prospective juror 019, who was in fact a grandmother of five. According to the majority, this suggested that the prosecutor either was incapable of judging age or was intentionally deceptive. See *Collins*, 365 F. 3d, at 683. A far more plausible explanation is that this was a simple accident made during a discussion of jurors 016, 019, and the jurors subject to the *Batson* challenge, and juror 006, a young, single, and white juror. See *id.*, at 688 (Hall, J., dissenting). During the discussion, juror 016 was frequently mentioned in tandem with either juror 019 or juror 006. It is therefore likely that the prosecutor simply flipped the 6 and 19 at one point. Since defense counsel made a similar mistake, this is by far the more plausible explanation. See *ibid.*

The majority also attacked by the prosecutor's credibility because she invoked one impermissible reason—maintaining a proper gender balance—as a reason for challenging juror 016. See *id.*, at 684 (majority). While an implausible or impermissible explanation can be evidence of discriminatory intent, see *Purkett* v. *Elem*, 514 U. S. 765, 767-768 (1995), a single reference to an improper reason by the prosecutor does not automatically render the trial court's denial of a *Batson* motion clearly erroneous. Gender balance was only one of the several reasons for the challenge, and was not mentioned by the trial court as a reason for accepting the prosecution's explanation. See App. to Pet. for Cert. 113-114. This minor impropriety, which was properly rejected by the trial court, see *Collins*, 365 F. 3d, at 684, does not transform its decision into clear error.

The majority also attacked the credibility of the prosecutor's explanation that juror 016 was young and single and therefore may be more tolerant of rock cocaine. See *id.*, at 681. The prosecutors's explanation is certainly logical, and in the context of the case, race-neutral, since she applied a similar reason to challenge a white juror, juror 006. See *id.*, at 681, n. 10. The majority rejected this explanation, finding juror 006 distinguishable from juror 016 because juror 006 "had never been employed and, significantly, had an uncle who was a recovered alcoholic." *Ibid.* At that level of specificity, the prosecutor could never find a comparable white juror. The uncle's alcoholism is simply irrelevant to the comparison. Given the high incidence of alcoholism, it is not unusual for someone to have an alcoholic relative. Juror 006's unemployment simply magnifies the lack of ties that he has in common with juror 016. While this provides a somewhat stronger justification for a peremptory challenge, it is not so different that it invalidates the reason given for juror 016.

The unchallenged white juror given by the majority as closer to juror 016 illustrates the majority's attitude to the trial court. It notes that juror 015 "possessed the same objective characteristics as Juror 016: both were single, employed

females with no children who responded to the trial court's questions in the same manner, thereby revealing the pretextual nature of this justification." *Id.*, at 681. The majority fails to mention the key factor tying together the prosecution's no-ties analysis, juror 016's youth. Like juror 016, juror 006 was young, see *id.*, at 688 (Hall, J., dissenting), while juror 015's age is never mentioned. Lacking clear and convincing evidence to the contrary, it is more than permissible to believe that jurors 016 and 015 are distinguishable by age, and that juror 016 is more comparable to the challenged juror 006 rather than the unchallenged juror 015.

The majority also held that the fact that juror 016 thought that crack cocaine should be illegal, and that she knew no one who had a problem with drugs or alcohol, rendered the prosecutor's justification implausible. See *id.*, at 680-681. This is simply untenable. While juror 016 may not have displayed overt signs of extra tolerance for drug offenders, it is not impermissible to infer greater sympathy or tolerance for drug offenders from a person's youth. A young person with few ties to the community may be more willing to give a low level cocaine offender a second chance, particularly in a "three strikes" case involving a potential 25 years to life sentence.[4] The prosecution's justifications for challenging juror 016, and the trial court's acceptance of them, are much more permissible to infer from the evidence than the majority's unforgiving reading of the facts.

One of the reasons given by the prosecution for challenging juror 016 was her demeanor at *voir dire*. See *supra* at 3. Demeanor is a classically valid justification for a peremptory challenge, see *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127,

4. While California juries are not specifically informed that they have a three strikes case, there is always the possibility that they can infer the nature of the potential penalty from facts like those found in this case: the defendant was charged with multiple prior serious or violent felony convictions, and was being tried for a relatively minor felony. See App. to Pet. for Cert. 109-110.

148 (1994) (O'Connor, J., concurring), and uniquely within the province of the trial court. The trial court's acceptance of the prosecutor's explanation regarding juror 016's demeanor is a finding of fact that the explanation was credible. App. to Pet. for Cert. 113-114, 116-117. Even though the judge did not observe the same demeanor in the juror, the critical question is whether the prosecutor was sincere in her belief she had observed it and that this was a reason for the challenge. The trial judge's finding of fact on the prosecutor's credibility is entitled to very strong deference.

The majority below is undeterred by these factors. In spite of a cold record, read years after the trial, it held that the trial court's holding that the prosecutor's explanation was credible was clear error, and that the California Court of Appeal's holding to the contrary was objectively unreasonable. See *Collins*, 365 F. 3d, at 684. The reasons given for this startling conclusion, the prosecutor's mistake regarding juror 019's age, the gender rationale for challenging jurors 016 and 019, and the purportedly pretextual nature of the youth and lack of ties justification, see *ibid.*, cannot support this claim. As noted earlier, they are all much less plausible than an interpretation of the facts supporting the trial court's decision. *Hernandez* requires no more. The fact that two black jurors were left on the final jury, see *id.*, at 685, n. 14; App. to Pet. for Cert. 113, while not dispositive by itself, reinforces this conclusion.

The majority's approach is summed up in one footnote in the opinion contesting the trial court's recognition of juror 016's relative youth:

> "We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 'was a youthful person, as was 006.' Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to

establish just how old Juror 016 might have been." 365 F.3d, at 680, n. 8.

The majority below has replaced the deference standards of *Hernandez* and the AEDPA with one of contempt for the trial court's findings. While this misapplies the AEDPA, it also misconstrues *Batson*. The California Court of Appeal's decision is not merely reasonable. It is also right.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

August, 2005

Respectfully submitted,

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No. 04-52

OCT 25 2005

In The

Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

v.

STEVEN MARTELL COLLINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

I. The Trial

Respondent Steven Collins ("Collins"), an African-American man, JA II 11,[1] was tried in the Los Angeles County Superior Court for possessing 0.10 grams of rock cocaine. PA 109-10. After a jury found Collins guilty and determined that he had been convicted of two prior felonies, PA 95-96, 109-10, the court sentenced Collins to a term of 25 years to life in prison under California's Three-Strikes Law. PA 96, 110.

Challenges for cause and hardship excuses left only three African-Americans on the panel. JA 36. After a judge-conducted voir dire, counsel were asked to exercise their peremptory challenges. JA 150. The prosecutor struck Juror 16, a female African-American juror. JA 168; JA II 3. Juror 16 stated during voir dire that she lived in Inglewood, was single, had no children, was employed as an automations clerk for the Federal Aviation Administration, and had no prior jury experience. JA 142. None of Juror 16's recorded responses to voir dire gave any reason to suspect she would be sympathetic toward the defense: She said that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to be a juror in this case; that she could decide the case solely on the evidence and instructions without regard to her personal feelings; that no one close to her had ever been accused of committing any crime that involved the use or possession of drugs or drug paraphernalia; that she thought the possession of rock cocaine

[1] "JA" refers to Volume I of the Joint Appendix filed by the parties. "JA II" refers to Volume II of the Joint Appendix. "PA" refers to the appendix submitted with the petition for writ of certiorari.

ought to be against the law; and that neither she nor anyone close to her had ever had a problem with drug or alcohol abuse. JA 139-45.

The prosecutor used her next peremptory to challenge the only other black woman in the venire, Juror 19. JA 183; JA II 3. Juror 19 was single, lived in Inglewood, and was a retired nurse with seven grown children and five grandchildren. JA 156-58. She also responded to voir dire in a manner that, if viewed race-blind, should have raised no red flags for the prosecution. She stated that she had never had an experience with police officers that was "particularly positive or particularly negative." JA 157. Although her youngest daughter had previously had a problem with drugs,[2] she had been clean for two years, JA 158, she had not been arrested, and Juror 19 was adamant that nothing about her relationship with her daughter or what her daughter had gone through might affect her ability to be impartial in this type of case. JA 159.[3]

When the prosecutor used a peremptory to strike this second black juror, defense counsel made a *Batson* motion, explaining that "the last two jurors excused by the People [Jurors 16 and 19] have been African-Americans." JA II 3.[4] The prosecutor replied:

---

[2] When asked what kind of drugs was involved, she initially said she had no idea, but then quickly stated she thought the drug was cocaine. When asked if the drug was rock cocaine, she said "no." JA 158.

[3] Juror 19 also stated that she could put her daughter's situation aside and be as objective as any other juror. JA 159.

[4] Collins made his objection pursuant to *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the California state law analogue to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 (9th Cir. 2003). This brief refers to Collins's jury discrimination challenge in state court as a *Batson* motion or claim.

> We have, it appears to me, two people of color, African-American type, left on the jury. I have excused two white people and two black people. I don't think there has been any particular people that have been excluded. . . . So it is not like I am picking on any certain minority. I don't think there has been a sufficient showing.

JA II 4. This comment neglected to address the fact that the prosecutor had struck two of the three African-Americans remaining on the panel. The judge ruled that a prima facie case had been made and asked the prosecutor for her explanations. JA II 4-5.

The prosecutor first asserted that both Juror 16 and Juror 19 were young (JA II 5) – a remarkably inaccurate contention with respect to Juror 19, who had described the occupations of five of her grown children and stated that she had five grandchildren. JA 156-58. The prosecutor then threw in another objection to Juror 16:

> Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court.

JA II 5.

Next the prosecutor appears to have confused the two black jurors with each other. Immediately after describing Juror 16's demeanor, the prosecutor stated: "She and Mr. 006 were both single, no ties." JA II 5. At this point, defense counsel evidenced confusion, asking "who is 006?" and the prosecutor replied,

> He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a

> daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

JA II 5-6.

In response to the court's question whether she had additional justifications, the prosecutor introduced a new variable, gender, by asking: "Does the court need cases for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area?" JA II 8. When defense counsel objected to the consideration of gender, JA II 9, the court observed that "the United States Supreme Court say[s] that the use of peremptory challenges based on gender is improper." JA II 12-13. The court then admonished the prosecutor, "I don't see, Ms. Satriano, that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it." JA II 13. The prosecutor backtracked, and returned to reliance on youth, then backtracked again by admitting that she had not struck other young jurors:

> I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

Id.

This ping-ponging among reasons did not deter the court from ruling for the prosecutor. With respect to Juror 19, that ruling was uncomplicated: "[B]eginning with [Juror 19], the court is satisfied that at least one race and gender neutral explanation was offered for the exercise of

that peremptory challenge, that being [Juror 19's] experiences with a family member who had a drug problem." JA II 14. With respect to Juror 16, the court began with candor and ended with charity:

> With regard to [Juror 16], the court, frankly, did not observe the demeanor of [Juror 16] that was complained of by the district attorney; however, [Juror 16] was a youthful person, as was [Juror 6]. And one or more prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to [Juror 16].

JA II 14-15.

The court then added that the denial was without prejudice to Collins's right to renew the motion, cautioning that "both parties are reminded that if the court does grant a [*Batson*] motion, the court is required to report its reasons to the State Bar of California." JA II 15. After this warning, the prosecutor exercised her remaining peremptory challenge against a white juror, leaving one African-American man on the panel.[5]

II. The State Appeal

On appeal, Collins challenged the denial of his *Batson* motion as to Juror 16, but not as to Juror 19. PA 179.[6]

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[5] Although the prosecutor suggested that two jurors were African-American (JA II 3), defense counsel clarified that although Juror 20 may be a woman of color, as the district attorney stated, "she is not African-American." JA II 11. Collins's traverse states that Juror 20 was Indian (Asian Indian), not African-American. *See* C.D. Cal. docket entry 42 at 6.

[6] Collins's federal petition similarly asserts a *Batson* claim solely with respect to Juror 16. Under *Batson*, the prosecutor's peremptory strike of Juror 19, and the reasons given therefore, are relevant

(Continued on following page)

Collins argued that the trial court denied the motion "solely based on the fact that [Juror 16] was young" (PA 191), and that the court failed to make a sincere and reasoned attempt to evaluate the prosecutor's explanations. PA 187.[7]

The California Court of Appeal affirmed the judgment. PA 109, 120. It held that youth was not a forbidden, cognizable class for the purposes of *Batson*, and stated that "peremptory challenges to youthful and/or immature prospective juror[s] repeatedly have been upheld as proper. [Citations omitted.] Thus, [it] f[ou]nd no merit to Collins's assertion [that] [Juror 16] was excluded from the jury based on her age." PA 115-16. The court further held:

> Additionally, even if the prosecutor's reliance on [Juror 16's] youth were improper, the prosecutor also stated the prospective juror had rolled her eyes and turned away from the trial court when the trial court spoke to the prospective juror. The trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt.
>
> Based on this evidence, the prosecutor's use of a peremptory challenge as to [Juror 16] was proper. . . . Because the prosecutor reasonably

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evidence on the issue of her intent to discriminate in striking Juror 16. *See infra*, Argument § I.A.

[7] The State suggests that in his postconviction challenges, Collins did not claim that the strike of Juror 16 was impermissibly based on race until his Ninth Circuit appeal. Petitioner's Brief on the Merits ("Pet. Br.") at 7-8. This is incorrect. Collins argued on direct appeal and in district court that the strike was racially discriminatory. PA 193 (arguing in his state appeal brief that "the prosecutor's reasons for excusing prospective juror #16 were insufficient to show that racial animus did not exist"); PA 101.

> could have interpreted [Juror 16's] body language as indicative of hostility or disrespect, a peremptory challenge exercised on that basis was not improper.

PA 116.

The court rejected the claim that "the trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's justifications," PA 116, reasoning that "[b]ecause nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to [Juror 16's] demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." PA 116-17 (citation omitted). Collins filed a petition for review in the California Supreme Court, which was denied without comment. PA 96.

III. The Federal Habeas Action

Collins's petition for writ of habeas corpus in federal district court asserted that the prosecutor's peremptory challenge of Juror 16 violated *Batson*. Collins represented himself *pro se* throughout the district court action, and not surprisingly, presented no additional evidence in support of his *Batson* claim. Consequently, the district court adjudicated the claim solely on the basis of the state court record.

A United States Magistrate Judge issued a report recommending that the *Batson* claim be denied and the petition be dismissed with prejudice. PA 95, 105. Despite the fact that the trial judge neither commented on nor made a finding concerning the "sincerity" of the prosecutor's explanation, the Magistrate Judge ruled that "[a]lthough the trial judge did not personally observe the

juror 'roll' her eyes, he made a finding that the prosecutor's proffered explanation was sincere and legitimate, and this Court must respect that finding unless it is rebutted by petitioner with clear and convincing evidence." PA 104. Ignoring the oscillations in the prosecutor's reasons, the Magistrate Judge also opined that "there is no indication in the record that the prosecution's age-related justification was a mere pretext for racial discrimination." *Id.* The district court adopted the report verbatim and dismissed the petition with prejudice. PA 91.

The Ninth Circuit Court of Appeals reversed the district court and granted relief, holding that the California Court of Appeal's decision represented an unreasonable determination of the facts and was an objectively unreasonable application of clearly established federal law. JA 35; 28 U.S.C. § 2254(d)(1), (2).

SUMMARY OF ARGUMENT

After the prosecutor used consecutive peremptory strikes to remove the only two African-American women remaining in the venire, Jurors 16 and 19, Collins made a *Batson* motion. The court found a prima facie case and asked the prosecutor to justify her strikes. Although the prosecutor initially asserted that both jurors were young (in fact, Juror 19 was a grandmother), she ultimately withdrew the rationale, saying that "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Upon questioning by the court, the prosecutor zigged and zagged from reason to reason, offering a litany of rationales that she claimed applied to both jurors, including youth, gender, "lack of ties in the community," and that they were "too tolerant" to serve in a drug case. In fact, aside from race, gender

and where they lived, Jurors 16 and 19 were quite disparate. They differed in age (youthful v. grandmother); occupation status (employed v. retired); number of children (none v. seven); and friends and relatives with drug problems (none v. a daughter). The prosecutor also claimed that after a statement made by the judge, Juror 16 "rolled her eyes and turned away from the court." The trial court denied the *Batson* motion, stating that he had not observed the demeanor complained of, but that Juror 16 was "a youthful person," as were other prospective jurors, and "[t]he court is prepared to give the district attorney the benefit of the doubt as to [Juror 16]."

The rule that reviewing courts should defer to findings of fact by the trial court is based on the premise that the trial court is in the best position to observe matters that may not be as readily discerned from the written record, such as the demeanor of witnesses. Application of the rule assumes that the trial court indeed assessed the relevant evidence and made a fact finding. Here, the trial court gave the prosecutor "the benefit of the doubt" that she was not discriminating and warned that any future *Batson* violations would be reported to the state bar. Assuming this even counts as a finding of no discrimination, it is far from clear, firm or persuasive. The trial judge also stated that he had not observed the demeanor alleged by the prosecutor; he affirmed, however, that Juror 16 was "a youthful person," as the prosecutor claimed, and gave the prosecutor "the benefit of the doubt" as to her strike of Juror 16 on that basis.

Standing the rule of deference to trial court factfinding on its head, the state appellate court "deferred" to a credibility determination the trial court never made. The court ruled that "[b]ecause nothing in the present record,

including the trial court's decision to give the prosecutor the benefit of the doubt as to [Juror 16's] demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." Repeating the trial court's error, the appellate court also affirmed the denial of the motion on the basis of the withdrawn youth rationale. Neither ground of the state court decision is supported by the record.

In granting relief on the *Batson* claim, the Ninth Circuit faithfully applied this Court's teaching in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"). It reviewed "all relevant circumstances" to assess the credibility of the prosecutor's justifications, and it applied the "unreasonable determination" standard of 28 U.S.C. § 2254(d)(2) and the "presumption of correctness" standard of § 2254(e)(1). The court rightly held that the state appellate decision represented an unreasonable determination of the facts because the record showed that the prosecutor failed to offer any credible justification for striking Juror 16. Instead, the record showed by clear and convincing evidence that, of the reasons given to strike Juror 16, one (gender) was illegal; a second (youth) was withdrawn and had not been applied to white panelists; a third ("too tolerant" to sit in a drug case) was contrary to the record and not applied to similarly situated white jurors; a fourth (single) was not applied to a similarly situated white juror; a fifth (lack of ties to the community) was unsupported by the record; and the sixth (demeanor) was uncorroborated by the trial judge and pretextual in light of all the relevant circumstances. The court also held that the state court unreasonably applied *Batson*. 28 U.S.C. § 2254(d)(1). This Court should affirm the Ninth Circuit judgment.

The State proposes a different, more deferential standard to apply to habeas claims than the one this Court applied in *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005) ("*Miller-El II*"), last term, and which the Ninth Circuit applied here. The State claims that 28 U.S.C. § 2254(d)(2) and (e)(1) both should be read as containing the sufficiency of the evidence standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). Had Congress intended federal habeas courts to apply the *Jackson* standard, it would have included it in the habeas statute. Congress did not do that. The State's proposal is inconsistent with the plain language of the habeas statute and with this Court's cases construing the statute. The State has not cited one case in which a court has read (d)(2) or (e)(1) as prescribing a *Jackson* kind of review.

Contrary to the State's position, the structure and text of the habeas statute show that (d)(2) and (e)(1) are mutually exclusive provisions that do not apply to the same claim. Subsection (d)(2) applies to situations, as here, where the petitioner challenges state court fact determinations solely on the basis of the state court record. Subsection (e)(1) applies only when the petitioner presents new evidence in federal court in support of his claim. Thus, § 2254(e) contemplates that if a petitioner meets the standard for obtaining a federal evidentiary hearing, he can present new material to try to overcome the presumption of correctness by clear and convincing evidence. However, if the petitioner makes a challenge under (d)(2) based solely on the state court record, (e)(1)'s presumption of correctness and clear and convincing rule do not apply.

ARGUMENT

I. THE CALIFORNIA COURT OF APPEAL'S DENIAL OF THE *BATSON* CLAIM WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS

Collins filed his federal habeas corpus petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore AEDPA applies to his case. *Woodford v. Garceau*, 538 U.S. 202, 207 (2003). 28 U.S.C. § 2254(d), as amended by AEDPA, "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000). The first issue in a case in which AEDPA applies is whether the petitioner has established a constitutional violation and therefore a right to habeas relief. If he has not, § 2254(d)'s limitations on the power to grant relief never come into play. *Weeks v. Angelone*, 528 U.S. 225, 237 (2000) (when petitioner's constitutional claim fails, it follows *a fortiori* that the state court denial of the claim is neither contrary to nor an unreasonable application of federal law under (d)(1)).[8] If, however, the petitioner proves a constitutional violation, the issue then becomes whether § 2254(d) nevertheless precludes habeas relief. As shown below, Collins has established a *Batson* violation.

---

[8] As explained in § III, *infra*, 28 U.S.C. § 2254(e)(1) is not applicable to this case because the federal habeas courts adjudicated Collins's *Batson* claim based solely on the state court record.

A. Applicable *Batson* Principles

Batson held that equal protection forbids prosecutors from using peremptory challenges on the basis of a juror's race. 476 U.S. at 89. *Batson* established a three-step test for evaluating claims that a prosecutor used a peremptory strike in violation of equal protection. *Miller-El I*, 537 U.S. at 328. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California*, 125 S. Ct. 2410, 2416 (2005).

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." *Johnson*, 125 S. Ct. at 2416. "'At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation.'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). This step "does not demand an explanation that is persuasive, or even plausible." *Id.*

Third, if the state provides a race-neutral justification, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98 (footnote omitted). "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338-39. At step three, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768.

"In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" and consider all relevant circumstances. *Batson*, 476 U.S. at 93; *Miller-El II*, 125 S. Ct. at 2325; *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (pl. op.) ("[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts"). Thus, "*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El II*, 125 S. Ct. at 2331.

Here, the trial court found a prima facie case (step one), and the prosecutor gave a facially race-neutral justification (step two). The dispute centers on whether an examination of all of the relevant circumstances shows that the prosecutor engaged in purposeful discrimination in striking Juror 16 (step three) and, if so, whether § 2254(d) nevertheless precludes relief.

B. A Consideration of All Relevant Circumstances Shows that the Prosecutor Purposefully Discriminated in Striking Juror 16

The California Court of Appeal ruled that the prosecutor gave two proper reasons for striking Juror 16: Juror 16's youth and her "eye-rolling" and "turning away." PA 115-16. The trial court found that the prosecutor gave one proper justification: youth. JA II 14-15. Collins addresses the youth justification first, then the demeanor rationale.

1. The Youth Justification Does Not Support the Strike

a. The Prosecutor Withdrew Youth as a Justification and Instead Equated Youth with Being "Too Tolerant" and "Lacking Ties in the Community"; Even if the Youth Rationale Was Not Withdrawn, It Was Pretextual

Although the prosecutor initially identified youth as a basis for challenging Jurors 16 and 19, upon questioning from the court she effectively abandoned that rationale. The record shows that the prosecutor equated youth with (1) being too tolerant to serve in a drug possession case and (2) lacking ties in the community, rationales the state trial and appellate courts never mentioned in their rulings as to Juror 16.

After the trial judge stated that a challenge based on gender was not "going to cut it," the prosecutor explained:

> I think I tied that into a lack of ties in the community with both of them [Jurors 16 and 19]; that that was one factor that I considered, that is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

JA II 13; *see also* JA II 5 ("Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case."). Since the prosecutor withdrew youth as a reason supporting her peremptory challenge, youth cannot be used as a basis to sustain the strike. *Miller-El II*, 125 S. Ct. at 2332 (A "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reason he gives. . . .

If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."); *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) (en banc) ("The inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court, not on all possible distinctions we can hypothesize.").

Even assuming youth was not withdrawn, by the prosecutor's own admission it does not explain the strike of Juror 16 (or 19): "It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Further, consideration of all of the relevant circumstances – including the reasons given for striking the only other black female panelist, Juror 19 – shows that youth was a pretext for discrimination.

The trial judge described Juror 16 as "a youthful person," JA II 14, but the record shows that Juror 19 "was at least a middle-aged grandmother." JA 54.[9] Juror 19 stated in voir dire that she was a retired nurse and had seven children (at lease five of whom were adults) and five grandchildren. The prosecutor's incorrect portrayal of Juror 19 as young is evidence that she used youth as a pretext for discrimination. *Miller-El II*, 125 S. Ct. at 2327 (finding discrimination where prosecutor mischaracterized struck juror's voir dire answers); *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998) (serious questions of pretext arise when facts in record are objectively contrary to prosecutor's justifications).

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[9] Like the rest of the prospective jurors, Jurors 16 and 19 never gave their age or were asked to give their age. The judge never described Juror 19's appearance on the record.

The State contends that the prosecutor merely misspoke when describing Juror 19 as young, accidentally referring to her "at one point" as Juror 6, a white man. Pet. Br. at 39-40. But the prosecutor's statement that "Ms. 016 as well as Ms. 019 were both young" was her immediate response to the court's request that she justify her "peremptory challenges of Ms. 019 and Ms. 016," and came before any discussion of Juror 6. JA II 4-5. Later in this discussion, the prosecutor said that Juror 16 and "Mr. 006 were both single, no ties." JA II 5. When the court subsequently stated that strikes based on gender were not "going to cut it," the prosecutor again said "that their youth was important." JA II 13. She could only have been referring to Jurors 16 and 19, since they were the subject of Collins's motion and there was no claim Juror 6, a man, was struck because of his gender. The prosecutor's statements were implausible, but not accidental.

The State suggests that the prosecutor's strike of Juror 6, a young white man, shows that the prosecutor did not discriminate in striking Juror 16. Pet. Br. at 39. However, the record shows that Jurors 6 and 16 were not similarly situated. Juror 6, unlike Juror 16, was unemployed (indeed, had never been employed) and had an uncle who was a recovered alcoholic (JA 108, 126), reasons for a strike that did not apply to Juror 16 and facts indicating the pretextual nature of the strike of Juror 16.

In addition to striking Jurors 6, 16 and 19, the prosecutor also struck Jurors 8 and 22. JA 150, 199-200.[10] In accepting the youth justification, the trial court noted that, in addition to Jurors 6 and 16, "one or more prospective

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[10] Jurors 6 and 8 were struck before the *Batson* hearing; Juror 22 was struck afterwards. JA 150, 160, 199-200.

jurors also" were youthful. JA II 14. The court did not explain whether it was referring to other prospective jurors who were struck by the prosecutor, and the record does not reflect the ages of any venire members. However, the record does show that even assuming that Jurors 8 and 22 were youthful, they were not otherwise similarly situated to Juror 16, and therefore their strikes do not legitimize the strike of Juror 16.

Juror 8 stated that she had served as a juror in a criminal case for driving under the influence that did not reach a verdict. JA 109. She had two friends with drug and/or alcohol problems; substance abuse was an ongoing problem with one friend, and she was not sure if it was ongoing with the other. JA 125. Juror 8 had doubts about her ability to be fair and impartial and had heard that drug dealing occurred in her neighborhood. JA 125, 128. Juror 22 stated that she had had both a particularly positive and a particularly negative experience with a police officer and had a brother and a cousin who had problems with alcohol. JA 169-70. Juror 16's voir dire answers on these topics are strikingly dissimilar from those given by Jurors 8 and 22, and even assuming Jurors 8 and 22 were youthful, the prosecutor's strikes against them do not show that youth was a persuasive, or even plausible, reason for striking Juror 16.

b. The Justifications of "Tolerance" and "Lacking Ties in the Community" Were Pretextual

Juror 16's voir dire answers show that she should have been an ideal juror in the prosecutor's eyes as far as her purported tolerance toward drug users. *Miller-El II*, 125 S. Ct. at 2329. Juror 16 stated that there was nothing

about the nature of the charge of possession of rock cocaine that might make it difficult for her to be a juror; that no one close to her had ever been accused of committing a crime that involved the possession of drugs or drug paraphernalia; that she thought the possession of rock cocaine ought to be against the law; and that neither she nor anyone close to her had ever had a problem with drug or alcohol abuse. There is no evidence in the record that remotely suggests that Juror 16 was tolerant of or sympathetic to persons involved with drugs, and the prosecutor did not try to solicit additional information from her on this topic. *Miller-El II*, 125 S. Ct. at 2327, 2330 n.8 (failure to ask questions on ground later used for strike "undermines the persuasiveness of the claimed concern"). The tolerance justification is implausible and contrary to the evidence in the record. *Id.* at 2329 ("the credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy' ").

A comparative analysis further highlights the pretextual nature of this rationale. If tolerance in a drug possession case is shown, at least in part, by having friends or relatives who abused drugs or alcohol and/or had drug or alcohol-related arrests – as the prosecutor suggested with respect to Juror 19 – then at least three white jurors were tolerant, yet none was stricken by the prosecutor.[11]

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[11] JA 118-19 (Juror 4's father was arrested on a drug charge and had been a recovered alcoholic and drug addict for 30 years); JA 144 (Juror 17's oldest son "had a drunk driving years ago"); JA 197-98 (Juror 30's older son had a cocaine problem from his late teens until mid-20s, but has been clean since going into drug rehabilitation); *see also* JA 201-02 (Juror 31's wife was an emergency room nurse who discussed with Juror 31 her work with persons who had overdosed on drugs).

Miller-El II, 125 S. Ct. at 2330 ("The fact that [the prosecutor's] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.").[12]

The prosecutor also justified her strikes of Jurors 16 and 19 on the basis that they lacked ties in the community. JA II 5, 13. The prosecutor did not explain what she meant by "lacking ties in the community," and this rationale is not sufficiently clear and reasonably specific or "related to the particular case to be tried" to withstand scrutiny. *Miller-El II*, 125 S. Ct. at 2324; *Batson*, 476 U.S. at 98. Whatever it means, it is hard to see how a retired nurse with seven children and at least five grandchildren (Juror 19) can "lack ties to the community." And as far as the prosecutor knew, Juror 16 spent her entire life in the same community; the record does not show otherwise. Tellingly, the prosecutor did not strike Juror 15, a white juror who, like Juror 16, was a single, employed woman with no children, and who answered the court's questions the same way as Juror 16 did. JA 50, 113; *Miller-El II*, 125 S. Ct. at 2325 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

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[12] The State suggests that the prosecutor may have had a sincere belief that all young people – apparently regardless of their stated attitudes – are tolerant of drugs. Pet. Br. at 42. If she did have such a belief, she did not act upon it in a race-neutral way, because she admitted she had not stricken all young jurors. Obviously, an assumption that all young African-American people are tolerant of drugs would be an impermissible basis for a strike, regardless of how sincere the belief.

2. The Demeanor Justification Does Not Support the Strike

a. The Trial Court Did Not Credit the Demeanor Rationale and Did Not Deny the Motion on that Basis

In upholding the denial of the *Batson* challenge on basis of Juror 16's purported demeanor, the California Court of Appeal denied Collins's claim on a ground on which the trial court did not affirmatively rely. The state appellate court held that:

> [t]he trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt. [¶] Based on this evidence, the prosecutor's use of a peremptory challenge as to prospective juror no. 016 was proper.

PA 116. The court further explained that "[b]ecause nothing in the present record, including *the trial court's decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor*, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference." PA 116-17 (emphasis added) (citation omitted).

However, the record shows that the trial judge in fact made no findings on the demeanor allegation but denied the *Batson* challenge solely on the youth rationale. The trial court stated:

> With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney; *however*, Ms. 016 was a youthful person, as was 006. And one or more prospective jurors also. [¶] The court is

> prepared to give the district attorney the benefit of the doubt as to Ms. 016.

JA II 14-15 (emphasis added).

The record thus plainly shows the trial judge's failure to observe the alleged demeanor and his willingness, *however*, to give "the district attorney the benefit of the doubt as to [Juror 16]" because she was "a youthful person," as the prosecutor had claimed. Contrary to the state appellate court's opinion, the record does not reflect that the trial court made a "decision to give the prosecutor the benefit of the doubt *as to prospective juror no. 016's demeanor*." PA 117 (emphasis added). The appellate court did not defer to a conclusion on which trial courts are entitled to great deference, as it purported to do. Rather, it denied Collins's claim on the basis of a credibility determination the trial judge never made.[13] The appellate court did not purport to make its own credibility determination on the demeanor justification, and it was in no better position to do so than the federal habeas courts.

b. The Demeanor Justification Is Not Credible, and the Prosecutor Failed To Offer Any Credible Reason To Strike Juror 16

The prosecutor's reliance on demeanor was uncorroborated, and there is no trial court finding on demeanor to which this Court can or must defer. The State's argument that federal habeas courts must defer to a state trial court's credibility determination assumes that the trial court in fact made such a determination. Here, the record

[13] The Magistrate Judge repeated this error. *See supra* at 7-8.

shows that the trial court did not. Deference is unwarranted where, as here, the record shows the trial court never made a credibility determination at all, much less a determination resulting from the sincere and reasoned analysis that *Batson* requires.

The State suggests that a demeanor justification is so talismanic that its invocation ends the *Batson* inquiry, rendering irrelevant all other evidence of disingenuity. But *Batson* and its progeny compel a state court to treat assertions of problematic demeanor in the same way any other purported justification is treated – by examining its persuasiveness, in light of all the relevant circumstances. The Ninth Circuit conducted the examination the state courts failed to undertake, and it properly concluded that all of the relevant circumstances show that the demeanor justification is implausible and pretextual.

There is nothing in the trial court record, except the prosecutor's representation, that indicates Juror 16 answered any question by saying "uh-huh" or that she rolled her eyes and turned away from the judge. The fact that the trial judge did not see the alleged demeanor is itself suspicious in this case; because the judge was conducting the voir dire, Juror 16 would have been facing him, not the lawyers, so the judge would have been in a better position to observe Juror 16. *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) (trial court's "observations [are] particularly crucial" when prosecutor strikes jurors on demeanor grounds; "[d]etermining who is and is not attentive requires subjective judgments that are

particularly susceptible to the kind of abuse prohibited by *Batson*").[14]

The persuasiveness of the demeanor rationale is further undercut by examining the prosecutor's use of peremptory challenges as a whole. *Miller-El II*, 125 S. Ct. at 2332 ("The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light."); *Riley*, 277 F.3d at 283 ("each piece of evidence should not be reviewed in isolation"; "'a reviewing court's level of suspicion may be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts.'"). Here, as in *Miller-El II*, the prosecutor's "chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion . . . ." 125 S. Ct. at 2339.

The record shows that the prosecutor:

- Offered a patently discriminatory reason to strike Jurors 16 and 19 – gender[15] – and then abandoned it after the court informed her that this Court had forbidden peremptory challenges on that basis.[16]

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[14] This case is thus unlike those where courts uphold peremptory strikes on demeanor grounds because the trial judge corroborated assertions regarding a juror's purported demeanor. *See, e.g., Williams v. Rhoades*, 354 F.3d 1101, 1106, 1108-09 (9th Cir.), *cert. denied*, 125 S. Ct. 345 (2004); *United States v. Walton*, 217 F.3d 443, 448 (7th Cir. 2000); *Stubbs v. Gomez*, 189 F.3d 1099, 1102, 1107 (9th Cir. 1999).

[15] *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994).

[16] Crediting the prosecutor's statement that gender motivated her strikes is tantamount to finding that she purposefully discriminated in striking Juror 16; discrediting the statement is tantamount to finding that she lied to the trial court regarding her reasons for striking Juror 16.

- Stated that she sought to strike Juror 19 because she was young and lacked ties to the community, when in fact Juror 19 was a grandmother and retired nurse with seven children (at least five grown) and five grandchildren.
- Asserted that she sought to exclude Jurors 16 and 19 because they were too tolerant to sit in a drug case, when she kept at least three whites on the jury who had friends or relatives who abused drugs or alcohol and/or had related arrests.
- Claimed that she struck Juror 16 because she was single but did not strike Juror 15, a single white woman whose voir dire answers were the same as Juror 16's.[17]
- Claimed that she struck Juror 19 because her responses regarding her daughter's past drug use showed she "was not sufficiently educated in some areas to decide a case like this" and that "it is beyond any of her experience." JA II 6. This claim may have some force in a complex antitrust case, but it is an absurd rationale to offer in a simple drug possession case. Further, Juror 19 was a retired nurse, making it implausible that, compared to other jurors, she was not "sufficiently educated" or "experienced" to decide a drug case. The prosecutor failed to strike a white juror who gave similar responses.[18]

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[17] Viewed on its own terms, the "single" rationale is not reasonably "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and the prosecutor never tried to explain how it was. The record also fails to show how it would bear on Juror 16's ability to serve as a juror in the case at bar. *Walker v. Girdich*, 410 F.3d 120, 123 (2d Cir. 2005) (granting habeas relief on *Batson* claim where prosecutor struck juror because the juror "was a Black man with no kids and no family").

[18] Juror 17 stated: "I think my oldest son had a drunk driving years ago," but Juror 17 never discussed this incident with his son. JA 144.

- Lumped Jurors 16 and 19 together even though they did not have much in common besides race, gender and where they lived: Jurors 16 and 19 differed in age (youthful v. grandmother); occupation status (employed v. retired); number of children (none v. seven); and friends and relatives with drug problems (none v. a daughter). *Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir. 1987).

3. Collins Has Established a *Batson* Violation

The Ninth Circuit properly held that Collins established a *Batson* violation. As shown above, one of the reasons given by the prosecutor for striking Juror 16 (gender) is illegal, and none of the other reasons – age, tolerance, lack of ties to the community, marital status or demeanor – is credible. Significantly, here, as in *Miller-El II*, the prosecutor shifted from rationale to rationale; if one was not playing well, she trotted out another. Thus, when the court advised that a gender-based strike was not "going to cut it," she shifted back to a youth rationale, and then abandoned that in favor of "lack of ties to the community." These new reasons "reek[] of afterthought" and are "difficult to credit." *Miller-El II*, 125 S. Ct. at 2328.

Jurors 16 and 19 shared few characteristics, except for race and gender. They were differently situated in terms of age, occupation, experience raising children, and experience dealing with close relatives with substance abuse problems. The prosecutor did not treat them as individuals, but instead claimed they were both disqualified from jury service because they were young, too tolerant and lacked ties to the community. That these reasons, pretextual on their own terms, were asserted against disparate black women further highlights that between the State's "explanation, and [Collins's] racial one, race is much the

better" explanation for the strike of Juror 16. *Miller-El II*, 125 S. Ct. at 2337.

Although the absolute numbers of jurors considered and peremptory strikes used were smaller than in a capital case like *Miller-El*, the statistical evidence regarding the prosecution's use of peremptories points in favor of a finding of discrimination. *Miller-El II*, 125 S. Ct. at 2325. Of the 23 prospective jurors who were considered in voir dire, three were African-American. The prosecutor used her peremptories to remove two of them, including both black women. She thus used 40% of her peremptories against African-Americans and removed 67% of the black prospective jurors. By contrast, the prosecutor struck only two of the 20 nonblacks (10%). *Miller-El II*, 125 S. Ct. at 2340 (finding discrimination where prosecutors struck 12% of nonblacks but 91% of blacks).

"[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987). Thus, it is of no moment that Collins challenges the exclusion of one juror, as opposed to several, and that one African-American served on his jury. *Holloway v. Horn*, 355 F.3d 707, 722 (3d Cir.) (granting claim where three African-Americans sat on jury); *cert. denied sub nom. Beard v. Holloway*, 125 S. Ct. 410 (2004); *Miller-El II*, 125 S. Ct. at 2325, 2330 (granting claim where one black served on jury).

C. Relief Is Proper Under 28 U.S.C. § 2254(d)(2)

The Ninth Circuit correctly concluded that the state appellate court's decision was an unreasonable determination

of the facts under (d)(2) because the prosecutor failed to offer any credible justification for striking Juror 16. JA 58.

The state appellate court decision is based on, and misconstrues, the trial judge's ruling, which in turn never firmly resolved the question whether the prosecutor purposefully discriminated in striking Juror 16. After stating that he had not seen the demeanor complained of by the prosecutor, and affirming that Juror 16 was "a youthful person," the trial judge denied Collins's *Batson* motion by stating that it was "prepared to give the district attorney the benefit of the doubt as to" her strike of Juror 16. The judge said the denial was without prejudice and warned that a future *Batson* violation would be reported to the state bar. Giving the prosecutor "the benefit of the doubt" and issuing a warning against future misconduct is not the same as finding as a matter of fact that the prosecutor did not intend to discriminate; at least, it is not a clear or firm finding.

The state appellate court gave two reasons for affirming the denial of the *Batson* motion. First, the court held that the youth justification was proper. In doing so, the court repeated the trial court's error and ignored the fact that the prosecutor had withdrawn the youth justification. Second, the court held that the demeanor justification was proper, stating that the trial judge properly gave the prosecutor the benefit of the doubt as to Juror 16's demeanor. This holding misstates the record, which shows that the judge did not see the demeanor alleged by the prosecutor and did not deny Collins's motion on the basis of demeanor. Rather, the judge gave the district attorney "the benefit of the doubt" and denied the motion on the basis of the withdrawn youth rationale. On the demeanor ground, then, the state appellate court deferred to a

credibility determination that the trial judge never made. Neither justification relied upon by the appellate court to deny the claim is supported by the record. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.) (misapprehension of record can result in unreasonable determination of facts), *cert. denied*, 125 S. Ct. 809 (2004); *Yung v. Walker*, 341 F.3d 104, 111 (2d Cir. 2003) ("the focus of § 2254(d)(2)" is "on whether the [state] court's factual findings are supported by sufficient evidence").

Even assuming the trial judge can be viewed as having accepted the demeanor rationale, the record shows by clear and convincing evidence that the rationale was not credible, and that the court should not have accepted it in light of the prosecutor's other implausible justifications. The record further shows by clear and convincing evidence that not one credible reason was given to strike Juror 16. *See supra*, Argument § I.B.; JA 58.

As the Ninth Circuit properly concluded, "[t]he fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that 'nothing in the present record indicates the trial court did not approach its task appropriately' highlights the objective unreasonableness of its assessment of the record." JA 58; *Miller-El II*, 125 S. Ct. at 2333 (finding unreasonable determination of facts where "the state court . . . had before it, and apparently ignored, testimony demonstrating that" the prosecutor's office had used a "jury shuffle" procedure to manipulate the racial composition of the jury); *Wiggins v. Smith*, 539 U.S. 510, 529 (2003) (state court's "assumption that counsel learned of a major aspect of Wiggins' background, i.e., the sexual abuse, from [social service] records was clearly erroneous" and "reflects 'an

unreasonable determination of the facts'"); *id.* at 528 (state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision"); *Simmons v. Luebbers*, 299 F.3d 929, 937 (8th Cir. 2002) (granting relief under (d)(2); "[i]t eludes us how the Missouri Supreme Court could have" reached the factual conclusion on which its denial of relief rested given that "independent review of the record" reveals that the state court's characterization of what was presented at the petitioner's first trial was "completely inaccurate"); *Alexander v. Cockrell*, 294 F.3d 626, 630-31 (5th Cir. 2002) (per curiam) (relief proper under (d)(2) because a "close review of the record persuades that the state trial court erred in reading" affidavit that formed the basis of the dispositive finding).

Collins is entitled to relief even under the interpretations of (d)(2) and (e)(1) proffered by the State. The conclusion that the prosecutor did not discriminate is not "supported by 'any substantial evidence' that would allow 'any rational trier of fact' to decide the facts as the state court did." Pet. Br. at 12.

II. THE CALIFORNIA COURT OF APPEAL'S DENIAL OF THE *BATSON* CLAIM INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The Ninth Circuit held that habeas relief was proper under § 2254(d)(1) because the California Court of Appeal's decision involved an unreasonable application of clearly established federal law. JA 35. The State does not meaningfully address this holding, much less explain why it is incorrect.

The California Court of Appeal unreasonably applied the third step of *Batson* in concluding that the trial court had fulfilled its duty to determine whether the prosecutor engaged in purposeful discrimination. The court concluded that "nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor, indicates the trial court did not approach its task appropriately . . . ." PA 116-17. In fact, as shown above, there is plenty in the record to demonstrate that the trial court did not approach its task appropriately. The trial judge did not recognize that the prosecutor had effectively withdrawn her youth justification, and he denied the *Batson* motion solely on the basis of that justification. Although the judge engaged in a partial comparative analysis of the youth rationale by comparing Juror 16 to Juror 6, he overlooked both the decisive dissimilarities between the two jurors and the fact that the prosecutor had also asserted youth as a reason to strike a grandmother (Juror 19). The judge did not recognize that the prosecutor had equated youth with tolerance and lack of ties to the community, and he failed to assess the persuasiveness of those rationales as to Juror 16, or the claim that Juror 16 was struck because she was single. The judge's ruling did not mention that the prosecutor had asserted an illegal basis for striking Jurors 16 and 19 (gender), or that many of the reasons for striking Juror 19 – youth, lack of ties to the community, lack of knowledge and experience – were facially implausible. Finally, the judge expressly noted that he had not observed the demeanor alleged by the prosecutor.

In cases involving claims of the failure to investigate and present mitigating evidence at the penalty phase of a capital trial, this Court has held that state courts unreasonably apply federal law by failing to evaluate the

totality of the available mitigating evidence, as this Court's precedents require. *Williams*, 529 U.S. at 397; *Rompilla v. Beard*, 125 S. Ct. 2456, 2467 (2005). In *Wiggins*, the Court held that a state court's "application of *Strickland*'s[19] governing legal principles was objectively unreasonable" because "the court did not conduct an assessment of whether the decision to cease all investigation . . . actually demonstrated reasonable professional judgment." 539 U.S. at 527.

Similarly, in a *Batson* case, the state court is required to "conduct an assessment" of all relevant circumstances bearing on the plausibility of the prosecutor's proffered reasons for striking a juror. The record here shows that the trial court failed to evaluate the totality of the available evidence and that the state appellate court was objectively unreasonable in concluding that the trial court had fulfilled its duty. *Walker*, 410 F.3d at 123-24 (state court unreasonably applied *Batson* where prosecutor's justification for striking black juror was not race-neutral); *Lewis*, 321 F.3d at 834-35 (state court unreasonably applied *Batson* where "the trial court did not conduct a meaningful step three analysis" and "the appellate court did not attempt to rectify the trial court's failure").

III. THE INTERPLAY OF 28 U.S.C. § 2254(d)(2) AND (e)(1)

In light of the State's claims as to the proper reading of 28 U.S.C. § 2254(d)(2) and (e)(1), Collins discusses here how and when (d)(2) and (e)(1) apply to a particular claim.

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[19] *Strickland v. Washington*, 466 U.S. 668 (1984).

In sections IV and V below, Collins addresses the flaws in the State's interpretation of the provisions.

As a general matter, sections 2254(d)(2) and (e)(1) are each concerned with state court factual findings and their effects in federal habeas corpus proceedings. That both provisions – housed in different subsections and prescribing different standards and approaches – speak to how a federal court is required to handle state court factual determinations creates a tension on the surface. On the one hand, subsection (e)(1), speaking in apparently mandatory terms, says state court factual findings "shall be presumed to be correct" absent a showing to the contrary by "clear and convincing evidence." On the other hand, subsection (d)(2) commands federal courts to assess the reasonableness of state court factual determinations "in light of the evidence presented in the State court proceeding" – that is, to look *beneath* the state court's factual *conclusions* (the same conclusions subsection (e)(1) would presume correct) to determine whether those conclusions are reasonable in light of the evidence that was before the state court.

This begs the question: How can a federal court *presume* a state court's *conclusion* to be correct ((e)(1)), while simultaneously looking *beneath* that conclusion to assess the reasonableness of the state court's work in *reaching* that conclusion to begin with ((d)(2))? As described below, the solution to this inconsistency lies not in forcing two facially incompatible (or, at best, redundant) provisions together, but in recognizing the individual roles each was designed to play in the overall scheme of habeas review. Section 2254(e) is addressed to questions that arise in the context of fact-development in federal court, and it operates to presume state court factual findings correct

unless the petitioner demonstrates the ability, both procedurally ((e)(2)) and substantively ((e)(1)), to rebut that presumption with evidence presented for the first time in federal court. Section 2254(d), by contrast, operates to limit a federal court's ability to grant habeas relief once it has found a constitutional violation, and allows such relief only where the federal court has identified a statutorily significant problem with the state court's treatment of the petitioner's claim. Within this framework, (d)(2) directs the federal court to scrutinize what the state court did *with the evidence before it*, and permits a grant of habeas relief only where the state court's erroneous denial of relief resulted from an objectively "unreasonable determination of the facts . . . ."

A. 28 U.S.C. § 2254(d)(2) and (e)(1) Are Mutually Exclusive Provisions That Do Not Apply to the Same Claim

The structure and text of § 2254(d) and (e) indicate that (d)(2) and (e)(1) are mutually exclusive provisions that do not apply to the same factual matter, but instead – as their placement in different subdivisions of § 2254 suggests – operate to address different situations and accomplish different tasks.[20]

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[20] Perhaps because of the confusion inherent in trying to apply both (d)(2) and (e)(1) to the same factual issue, the lower federal courts have said remarkably little about the relationship between these provisions during the more than nine years since AEDPA took effect. Recently, however, a handful of courts have analyzed that relationship, and although their results contain relatively minor variations, they have generally settled on approaches consistent with the argument Collins presents here. *See generally Lambert v. Blackwell*, 387 F.3d 210, 235-37 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2516 (2005); *Taylor*, 366 F.3d at

(Continued on following page)

Because federal habeas courts typically assess the state of the factual record early in the adjudicative process, we begin with § 2254(e). On its face, § 2254(e) is crafted to serve two finite and closely related purposes: limiting the circumstances under which habeas petitioners are permitted to present evidence to a federal court in the first instance; and defining the standard of proof that must be met when a petitioner is permitted to present evidence and seeks to use that evidence to challenge a factual determination made by a state court. The first of these purposes was recognized by this Court in *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000) (construing § 2254(e)(2)). The second is plain from the language of § 2254(e)(1), which provides, in relevant part, that "a determination of a factual issue made by a State court shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Read together, subdivisions (1) and (2) of § 2254(e) thus have a discrete function: to prescribe when an evidentiary hearing is permitted, what stature pre-existing state court factual findings will have at such a hearing, and what a petitioner must produce at the federal hearing in order to justify the setting aside of the state court's findings.[21]

999-1008. As described *infra*, the State can claim no such support for the *Jackson v. Virginia*-based theory it seeks to advance.

[21] The history of the habeas statute further supports this reading. In drafting AEDPA, Congress moved the presumption of correctness contained in former § 2254(d) to § 2254(e)(1), and placed it next to the newly drafted (e)(2). Under the former § 2254(d)(8), the requirement that the petitioner rebut the presumption of correctness by convincing evidence applied only when there had been "an evidentiary hearing in the proceeding in the Federal court." Although this language does not appear in (e)(1), neither does language stating that the burden of

(Continued on following page)

Where there is no federal evidentiary hearing – either because the petitioner cannot meet the demanding requirements of § 2254(e)(2) or because the factual record that emerged from the state court is complete with regard to the claim under consideration – § 2254(e) is best read as having no role to play in the federal habeas court's analysis. Although the language of (e)(1) is broad enough on its face to touch every instance of a federal court's consideration of a state court's factual determination – as evidenced by this Court's brief statements to that effect in *Wiggins* and *Miller-El II* – such a reading is neither consistent with the canon that a "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (citation omitted) (quoted in *Duncan v. Walker*, 533 U.S. 167, 174 (2001)), nor necessary to the overarching AEDPA objective of maintaining respect for state court judgments.

Section 2254(e)(1) should not and need not be read to apply beyond the scenario in which a petitioner is permitted to present new evidence in federal court for the simple reason that (d)(2), by its plain language and position in the

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rebutting the presumption by clear and convincing evidence applies in all cases regardless of whether a federal evidentiary hearing is held. It cannot be assumed that Congress intended to repudiate this history, and (e)(1)'s placement next to the evidentiary hearing standard in (e)(2) suggests that it did not. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the . . . incorporated law, at least insofar as it affects the new statute"); Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. Pub. Int. L.J. 135, 139 (1996) ("[T]he omission of the former § 2254(d)'s reference to the petitioner's burden 'in' a federal hearing is easily explained. This new provision is considerably shorter than its predecessor and may only reaffirm prior law in a more concise way.").

statutory scheme, is tailor-made, and better suited, to the task. Unlike (e)(1) – which is situated in the same subdivision as the provision governing the availability of new fact development in federal court – (d)(2) is part of AEDPA's mechanism for limiting a federal court's power to remedy a constitutional violation. (*Terry*) *Williams*, 529 U.S. at 412 (§ 2254(d) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court"); *Wiggins*, 539 U.S. at 534 ("The requirements for habeas relief established by 28 U.S.C. § 2254(d) are thus satisfied."). As such, § 2254(d)(2) is concerned not with whether evidence presented for the first time in federal court establishes a constitutional violation,[22] but with whether the state court's denial of relief on a claim the federal court has found meritorious under § 2254(a) is attributable to the state court having unreasonably determined the facts from the evidence it had before it.

That it is best to read (d)(2) as occupying the "field" where a federal habeas court adjudicates a constitutional claim using only the record that was before the state court is clear when one considers the alternative. If (e)(1) were part of the equation, then the federal court would be required to apply two different standards – one a standard

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[22] As this Court recognized in *Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (per curiam), "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer." *See Monroe v. Angelone*, 323 F.3d 286, 297-99 & n.19 (4th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003); *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001); *Rojem v. Gibson*, 245 F.3d 1130, 1140 (10th Cir. 2001).

of proof ((e)(1)'s "clear and convincing" requirement), and the other an assessment of past performance by another court ((d)(2)'s "reasonableness" requirement) – to the same factual issue. This makes no sense as a practical matter, especially in view of the fact that (e)(1) speaks to evidence that was not before the state courts, while (d)(2) is expressly restricted to evidence that was before the state courts. Moreover, the confusion and excess work brought about by using both standards yields no appreciable benefit in the form of added protection for state court decisions. After all, as this Court explained in (*Terry*) *Williams*, Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect" in § 2254(d), such that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision [was] . . . erroneous[] or incorrect[]. Rather, that [decision] must also be unreasonable." 529 U.S. at 411.

In light of the confusion and unnecessary doubling of analyses that would be inherent in reading both (e)(1) and (d)(2) to apply to the same factual issues, and in light of the cues to be taken from each provision's placement in different parts of the statutory scheme, they should be given "independent meaning." (*Terry*) *Williams*, 529 U.S. at 404. Where a petitioner is permitted to present new evidence to a federal habeas court for the purpose of challenging an existing state court factual finding, (e)(1) sets the bar the petitioner must surmount. But where the evidence before the federal habeas court is the same as the evidence that was before the state court, and the federal habeas court has concluded that a constitutional violation has been shown, habeas relief is permitted where the petitioner can further demonstrate that the state court's failure to find error is attributable to unreasonableness in

its determination of a fact material to the resolution of the claim. This approach is workable and clearly understandable, avoids the unwieldiness of applying two different inquiries to the same issue, assigns discrete but important roles to each provision, and results in no derogation of AEDPA's core purposes.

IV. THE STATE'S ARGUMENT THAT § 2254(d)(2) INCORPORATES A "REASONABLE FACT-FINDER" STANDARD SHOULD BE REJECTED BECAUSE IT IS INCONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND THIS COURT'S CASES CONSTRUING THE STATUTE

The State contends that § 2254(d)(2) incorporates the sufficiency of the evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307. Pet. Br. at 25-27. It argues that "[u]nder the (d)(2) standard, the habeas corpus court must defer to state-court findings of fact if supported by 'any substantial evidence' that would allow 'any rational trier of fact' to decide the facts as the state court did." *Id.* at 12. The State is wrong.

A. The State's Position Is Inconsistent with the Statute's Plain Language

The State never comes to terms with the fact that (d)(2) speaks in terms of "reasonableness," not "rationality." Throughout its brief, the State conflates the two terms. Pet. Br. at 27 ("[r]eview for reasonableness or rationality inquires whether any 'substantial evidence' supported the trier of fact's determination"); *id.* at 25 ((d)(2) "points to *Jackson v. Virginia*-like review for rationality or reasonableness"). As a general matter, the terms may or may not be synonymous depending on how they

are used in a particular legal rule. For example, under the "rational basis" test for equal protection claims, classifications are upheld if they are "reasonable." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). Here, however, the State seeks to apply the specific rationality test of *Jackson*, which provides "sharply limited" review of sufficiency of the evidence claims. *Wright v. West*, 505 U.S. 277, 296 (1992) (pl. op.). *Jackson*'s rationality test cannot be confused with the reasonableness standard of (d)(2).

The *Jackson* standard is based on the premise that once a defendant has been found guilty of the crime charged, the role of the factfinder (often a jury) as the weigher of all of the evidence is not to be disturbed except as necessary to guarantee due process. *Jackson*, 443 U.S. at 319. It requires reviewing courts to consider all of the evidence in the light most favorable to the prosecution. *Id.* If the record supports conflicting inferences, reviewing courts "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326. "[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957-58 (9th Cir. 2004). *Jackson* "does not require scrutiny of the reasoning process actually used by the factfinder – if known." *Jackson*, 443 U.S. at 319 n.13. This brief review of the *Jackson* standard shows both why the State would like to import it into § 2254(d)(2), and why it would be inappropriate to do so.

The plain terms of § 2254(d)(2) require federal habeas courts to examine (1) the state court's "determination of

the facts" (2) "in light of the evidence presented in the State court proceeding," and (3) then decide whether the determination was "unreasonable." Congress specifically used these terms and not the terms suggested by the State. (*Terry*) *Williams*, 529 U.S. at 411 (in analyzing the "unreasonable application" prong of § 2254(d)(1), emphasizing that "Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect'"); *Arkansas v. Farm Credit Services*, 520 U.S. 821, 827 (1997) (statutory language is to be enforced according to its terms). If Congress had intended to incorporate the *Jackson* standard – enunciated a decade and a half before AEDPA was enacted – into (d)(2), it would have used the terms of that standard. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts assume that Congress is aware of existing law when it passes legislation). But Congress did not use those terms, and this Court should decline the State's invitation to rewrite the statute to implement its proposal. *Bates v. United States*, 522 U.S. 23, 29 (1997) (courts ordinarily resist reading words into a statute that do not appear on its face).

The State's argument is also rebutted by the terms used in other parts of the statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (courts are to consider the statute in all of its parts when construing any one part). Section 2254(f) addresses challenges to "the sufficiency of the evidence." Thus, Congress was aware of insufficiency claims in enacting AEDPA; had it intended to adopt an insufficiency standard in (d)(2), it would have done so. Section 2254(d)(1), the neighboring provision in the part of the statute containing the limitations on the power to grant habeas relief, uses the same modifier as (d)(2) in requiring that an application of law be

"unreasonable" (not "irrational") in order for relief to be granted.

B. The State's Position Is Inconsistent with This Court's Cases Construing 28 U.S.C. § 2254(d)

The State's argument is also contrary to this Court's precedents interpreting and applying (d)(2). The State concedes that the *Wiggins* and *Miller-El* decisions "indicate that this Court under AEDPA has engaged in a greater level of scrutiny of state-court fact determinations than the *Jackson v. Virginia* type of rationality standard would permit." Pet. Br. at 31. The State also admits that "in the context of a discussion regarding § 2254(d)(2) and (e)(1)," *Miller-El I* "indeed stated that '[d]eference does not imply abandonment or abdication of judicial review' and that a "federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* Yet the State asserts that "neither these statements, nor the results in *Wiggins* and *Miller-El v. Dretke*, are inconsistent with the State's argument." *Id.* But the State's argument *is* inconsistent with this Court's caselaw, and the State cannot explain how it is not.

In *Lindh v. Murphy*, 521 U.S. 320, 332 (1997), this Court explained that § 2254(d) "deal[s] with, among other things, the adequacy of state factual determinations as bearing on a right to federal relief . . . ." In *Wiggins*, the Court examined the adequacy of state court factfinding, and concluded that the state decision resulted in an unreasonable determination of the facts because it was based, in part, on a "clear factual error": it assumed that defense counsel had learned from

social service records that their capital client had been sexually abused, when the records in fact did not mention any such abuse. 539 U.S. at 528.

In *Miller-El II*, the Court concluded that the state court's *Batson* decision resulted in an unreasonable determination of the facts where the state court ignored testimony of past manipulation of the racial composition of juries by the same district attorneys' office that prosecuted the habeas petitioner. 125 S. Ct. at 2333. The Court disagreed with the state court's credibility determination that the prosecutor did not discriminate, and concluded that the state court finding was unreasonable. *Compare Tibbs v. Florida*, 457 U.S. 31, 37 (1982) (*Jackson* standard does not "draw[] the appellate court into questions of credibility"). Relief was appropriate under (d)(2) even though "at some points the significance of [the habeas petitioner's] evidence" of discrimination was "open to judgment calls." *Miller-El II*, 125 S. Ct. at 2339.

Consistent with the terms of the statute and this Court's jurisprudence, the lower federal courts have held that (d)(2) requires federal habeas courts to examine the adequacy of state court factual determinations. *See, e.g., Taylor*, 366 F.3d at 999-1000 ((d)(2) requires federal habeas courts to review state court's fact-finding processes); *Lambert*, 387 F.3d at 239 ("the procedures a state court applies when adjudicating a petitioner's claims . . . may well affect whether a state court's factual determination was 'reasonable'" under (d)(2) "or whether the petitioner has adequately rebutted a presumption that the state court's determination is correct"); *compare Jackson*, 443 U.S. at 319 n.13 (under rational factfinder standard, reviewing court does not consider reasoning process actually used by trier of fact).

The State's argument is also inconsistent with this Court's interpretation of the "unreasonable application" clause of § 2254(d)(1). In *Williams*, the Court rejected the interpretation that a state court decision involves an unreasonable application of federal law "only if the state court has applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" 529 U.S. at 409. The Court ruled that an "'all reasonable jurists' standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one." *Id.* at 410. "The placement of this additional overlay on the 'unreasonable application' clause was erroneous." *Id.* at 409; *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) (cited by the State) (under *Williams*, "it is not enough that a single reasonable jurist may agree with the application" of federal law by the state court) (footnote omitted).

Despite *Williams*, the State argues that the standard under (d)(2) is "whether all reasonable decision-makers would have been compelled to agree with the habeas corpus petitioner," a standard that "equates with the habeas corpus 'any rational trier of fact' standard described in *Jackson v. Virginia* . . . ." Pet. Br. at 26-27. Elsewhere the State argues that "[i]n light of the identical use of the term 'unreasonable,' the 'unreasonable determination of the facts' standard in (d)(2) also involves the same kind of appraisal of 'unreasonableness' as is provided in (d)(1)." Pet. Br. at 26. This latter argument, coupled with the Court's interpretation of (d)(1) in *Williams*, is fatal to the State's claim.

Not only is the State's position inconsistent with this Court's caselaw, it is unsupported by any authority. The federal courts have been applying and construing AEDPA

for over nine years now, but tellingly, the State has not cited a single case in which a court has read (d)(2) as prescribing a *Jackson v. Virginia* type of review.[23]

The State's attempt to ratchet down the level of federal habeas scrutiny is particularly ill-considered in the *Batson* setting, where the courts are charged with protecting the equal protection right to jury selection free of racial discrimination; some prosecutors are taught how to discriminate and evade detection under *Batson*;[24] discriminatory intent can be difficult to prove even in the strongest of cases;[25] a violation constitutes a rare structural error requiring a new trial without a showing of prejudice; and a deferential standard of review is already built into the substantive standard of the underlying constitutional claim.

V. THE STATE'S PROPOSAL TO READ A "RATIONAL FACTFINDER" STANDARD INTO § 2254(e)(1) SHOULD ALSO BE REJECTED

The State contends that just like (d)(2), (e)(1) must be read as containing the *Jackson* standard. The State

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[23] *Jackson*'s highly deferential standard is also premised on a justification that is not present in the vast majority of habeas cases: Obtaining relief under *Jackson* signifies the rejection of the core findings of a jury and precludes a retrial.

[24] *See, e.g.*, *Wilson v. Beard*, No. 04-2461, 2005 WL 2559716 (3d Cir. Oct. 13, 2005) (discussing videotaped training session advising Philadelphia prosecutors to avoid "young black women" as jurors and instructing on "the best way to avoid any problems" under *Batson*).

[25] *Miller-El II*, 125 S. Ct. at 2340 (Breyer, J., conc.). "[T]he discriminatory use of peremptory challenges remains a problem," and "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Id.* at 2341-42.

asserts that (e)(1)'s "presumption, when attacked solely on the state record, cannot properly be said to be defeated by 'clear and convincing evidence' if the state record contains 'any substantial evidence' upon which 'any rational trier of fact' could have found the facts as the state court did under the applicable burden of proof." Pet. Br. at 30. This argument is untenable for the same reasons its (d)(1) claim fails: it is inconsistent with the statute's plain language and this Court's caselaw.

The State tries to bootstrap (e)(1) to its (d)(2) argument. It contends that if (d)(2) is read as containing the *Jackson* standard, then (e)(1) must be read the same way, too. "Applying any more instrusive standard [under (e)(1)] would risk treating § 2254(e)(1) anomalously as a relaxation rather than a tightening of the availability of the writ." Pet. Br. at 30. The State also lumps the two provisions together. *Id.* at 15 ("Separately and together, these provisions prohibit habeas corpus relief for challenges based on disputes about the facts arising solely from a state court record that rationally supported the state court's findings."). Although the State acknowledges this Court's explanation that (d)(2) and (e)(1) represent "independent requirements," *id.* at 28, it ignores this teaching.

Miller-El I explained that (d)(2) "contains the unreasonable requirement and applies to the granting of habeas relief . . . ." 537 U.S. at 341-42. By contrast, "[t]he clear and convincing evidence standard is found in § 2254(e)(1) . . . [and] pertains only to state-court determinations of factual issues, rather than decisions." *Id.* at 341. *Miller-El I* held that the provisions cannot be merged together to require habeas petitioners to prove that a factual determination is unreasonable by clear and convincing evidence. *Id.*

Regardless of the burden of proof for rebutting particular factual determinations, the requirements for granting the writ are contained in § 2254(d). Because (d)(2) and (e)(1) are independent provisions designed to serve different purposes, there is no "anomaly," as the State claims, in their containing different standards. The State's argument renders the provisions superfluous and fails to give them independent meaning. (*Terry*) *Williams*, 529 U.S. at 404 (it is "a cardinal principle of statutory construction that [courts] must 'give effect, if possible, to every clause and word of a statute' ").

The State's argument is undercut by the language used in the provision immediately succeeding (e)(1). Section 2254(e)(2)(B), drafted as part of AEDPA, precludes a federal evidentiary hearing when the petitioner "has failed to develop the factual basis of the claim in State court proceedings" unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Thus, had Congress intended to add a "factfinder" standard to the "clear and convincing" test of (e)(1), it would have done so.

The State never persuasively explains why *Wiggins* and *Miller-El* render its proposed reading of (e)(1) anything other than a dead letter. The State's response to these cases is to characterize the Court's (e)(1) (and (d)(2)) analysis in *Wiggins* as dicta, because it followed the Court's finding of (d)(1) error; to claim that *Wiggins* did not really mean what it said when it deemed a determination of fact unreasonable because it was based, in part, on a "clear factual error"; and to assert that *Miller-El* "indicates that this Court had determined that no rational fact-finder

could have rejected the inference of race discrimination in that case." Pet. Br. at 32, 33. The State cannot wipe the slate clean by ignoring (*Wiggins*) or rewriting (*Miller-El*) the Court's key cases on (d)(2) and (e)(1).

In support of its argument, the State claims that "the (e)(1) presumption of correctness is now unconditional; AEDPA entirely deleted what had been eight enumerated conditions or exceptions to the presumption's operation" that were contained in the former § 2254(d). Pet. Br. at 22; *id.* at 28. According to the State, "Congress' deletion of conditions or exceptions to the presumption . . . illuminates the direction in which Congress meant to move in § 2254(e)(1)." *Id.* at 29. The deletion may suggest a directional tilt, but it does not hint at the direction proposed by the State.

The State's argument proves too much. Among the conditions deleted are the requirements that the state court have had jurisdiction, afforded defendant due process, and actually resolved the merits of the factual dispute. Former 28 U.S.C. § 2254(d)(1), (4), (7). "Read literally," AEDPA thus "eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard to the process from which it was generated." Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.). "A regime of that kind may, of course, raise serious due process questions – at least in some cases." *Id.* (footnote omitted); *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."). This

Court has never suggested that AEDPA so radically altered the pre-existing habeas regime.

Wiggins and *Miller-El II* demonstrate that this Court has declined to read (e)(1) or (d)(2) to require federal habeas courts to rubber-stamp state court findings of fact regardless of how they were made or whether they are supported by the record. *See also Taylor*, 366 F.3d at 999-1000; *Lambert*, 387 F.3d at 238-39; Yackle, *Federal Hearings Under the New Habeas Corpus Statute*, 8 B.U. Pub. Int. L. J. at 141 ((e)(1) does not "dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record"; (e)(1) "departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards").

The State argues that "[t]he burden now always devolves upon the prisoner to rebut the presumption not just with 'convincing' evidence as in former § 2254(d) but with 'clear and convincing evidence.' This is an extremely heavy burden." Pet. Br. at 28. So does the State contend that there was formerly a category of "unclear but convincing evidence" that would have rebutted the presumption? "Convincing" is, and was, the key term, and the addition of the word "clear" does not increase the petitioner's burden. Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4265.2 (2005 Supp.).

The State's fallback argument is that under (e)(1), the "clear error" standard should apply, as it does on appeal of factfindings under *Batson*. Pet. Br. at 35. Collins agrees that this is a reasonable construction of the statute. It is the language used in *Wiggins* and *Miller-El II*, and in Fed.

R. Civ. P. 52(a) for reviewing findings of fact by district courts. It is a deferential standard – allowing reversal only when the reviewing court is left with a "definite and firm conviction that a mistake has been committed" – and one federal courts are used to applying.

The State's *Jackson* proposal, by contrast, would allow relief only when the state court acted "irrationally." As the State concedes, it would be a rare case when one could say that the trial judge acted irrationally in finding facts. But judges do make serious, material mistakes of fact short of acting irrationally. Subsection (e)(1) is designed to allow habeas petitioners to overcome defective findings of fact by clear and convincing evidence, a "demanding but not insatiable" standard. *Miller-El II*, 125 S. Ct. at 2325.

CONCLUSION

For all of the above reasons, this Court should affirm the judgment of the Ninth Circuit.

Dated: October 19, 2005

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RICE, WARDEN, ET AL. *v.* COLLINS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–52. Argued December 5, 2005—Decided January 18, 2006

After the prosecutor struck a young, African-American woman, Juror 16, from the panel at respondent Collins' state-court drug trial, Collins objected that the strike was made on account of Juror 16's race. As race-neutral explanations for the strike, the prosecutor said that Juror 16 had rolled her eyes in response to a question from the court; that she was young and might be too tolerant of a drug crime; and that she was single and lacked ties to the community. In rejecting Collins' challenge, the trial court declared that it did not observe the complained-of demeanor by Juror 16, but noted that she was youthful, as was a white male juror also dismissed by peremptory challenge, and stated it would give the prosecutor "the benefit of the doubt." The prosecutor had also referred to Juror 16's gender in explaining the strike, but the trial court disallowed any reliance on that ground. The California Court of Appeal upheld the conviction and the trial court's ruling on the peremptory challenge, finding that the prosecutor permissibly excluded Juror 16 based on her youth. Even if youth was not a legitimate reason to exercise a peremptory challenge, said the court, Juror 16's demeanor supported the strike; nothing in the record suggested the trial court failed to conduct a searching inquiry of the prosecutor's reasons for striking her. The California Supreme Court denied review. The Federal District Court dismissed Collins' habeas petition with prejudice, but the Ninth Circuit reversed and remanded, concluding that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the State Court of Appeal's affirmance was based on an unreasonable factual determination in light of the evidence presented at trial.

Held: The Ninth Circuit's attempt to use a set of debatable inferences to set aside the state court's conclusion does not satisfy AEDPA's re-

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quirements for granting habeas relief. Pp. 3–8.

(a) Under *Batson* v. *Kentucky*, 476 U. S. 79, 98, a defendant's challenge to a peremptory strike allegedly based on race requires, *inter alia*, that the trial court determine whether the defendant has carried his burden of proving purposeful discrimination. This involves evaluating "the persuasiveness of the [prosecutor's proffered] justification" for the strike, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett* v. *Elem*, 514 U. S. 765, 768. Because, under AEDPA, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U. S. C. §2254(d)(2), a federal court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge. Pp. 3–4.

(b) Though the Ninth Circuit recited the proper standard of review, it improperly substituted its evaluation of the record for that of the state trial court, which, under §2254(d)(2), did not make an unreasonable determination of the facts in light of the evidence presented. Noting that the trial court had not witnessed Juror 16's purported eye rolling, the Ninth Circuit concluded that no reasonable factfinder could have accepted the prosecutor's rendition of the alleged incident because the prosecutor had completely undermined her own credibility based on three considerations: her erroneous statement that another prospective African-American juror, Juror 19, was "young" when, in fact, she was a grandmother; the prosecutor's improper attempt to use gender as a basis for exclusion; and the Court of Appeals' skepticism toward the prosecutor's explanation that she struck Juror 16 in part because of her youth and lack of ties to the community. As to the first reason, because the prosecutor's reference to Juror 19's youth occurred during a discussion of three prospective jurors, two of whom were, indeed, young, it is quite plausible that the prosecutor simply misspoke. It is a tenuous inference to say that an accidental reference with respect to one juror undermines the prosecutor's credibility with respect to another. Second, the Ninth Circuit assigned the prosecutor's reference to Juror 16's gender more weight than it can bear, given that the prosecutor provided a number of other permissible and plausible race-neutral reasons for excluding her. Collins provides no argument why this matter demonstrates that a reasonable factfinder must conclude the prosecutor lied about the eye rolling and struck Juror 16 based on her race. Finally, even if the prosecutor's concerns about Juror 16's youth and lack of community ties were overly cautious, her wariness could be seen as race neutral, for she used a peremptory strike on a white male juror, Ju-

Syllabus

ror 6, with the same characteristics. Viewing the foregoing concerns together, the most generous reading would suggest only that the trial court had reason to question the prosecutor's credibility regarding Juror 16's alleged improper demeanor. That does not, however, compel the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude Collins had shown a *Batson* violation. Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination. Pp. 4–8.

365 F. 3d 667, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, in which SOUTER, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–52

BERTRAM RICE, WARDEN, ET AL., PETITIONERS *v.* STEVEN MARTELL COLLINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 18, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

Concerned that, in this habeas corpus case, a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record, we granted certiorari. Our review confirms that the Court of Appeals for the Ninth Circuit erred, misapplying settled rules that limit its role and authority.

I

After a 4-day trial in the Superior Court of California for the County of Los Angeles, a jury convicted Steven Martell Collins on one count of possessing cocaine with intent to distribute. The conviction was all the more serious because it subjected him to California's three strikes rule for sentencing. The question at issue in this federal habeas corpus action, however, is the California courts' rejection of Collins' argument that the prosecutor struck a young, African-American woman, Juror 16, from the panel on account of her race. A second African-American juror was also the subject of a peremptory strike, and although Collins challenged that strike in the trial court, on appeal he objected only to the excusal of Juror 16.

Even prior to this Court's decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), California courts barred peremptory challenges to jurors based on race. *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978). Although our recent decision in *Johnson* v. *California*, 545 U. S. ___ (2005), disapproved of the manner in which *Wheeler* and *Batson* were implemented in some California cases, the state courts in this case used the correct analytical framework in considering and ruling upon the objection to the prosecutorial strike.

As race-neutral explanations for striking Juror 16, the prosecutor said that Juror 16 had rolled her eyes in response to a question from the court; that Juror 16 was young and might be too tolerant of a drug crime; and that Juror 16 was single and lacked ties to the community. A further, more troubling part of the prosecutor's unorganized explanation was her reference to Juror 16's gender. The trial court, correctly, disallowed any reliance on that ground. The trial court, furthermore, which had the benefit of observing the prosecutor firsthand over the course of the proceedings, rejected Collins' challenge.

> "With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge]. And one or more prospective jurors also. The Court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016." 2 App. 14–15.

The California Court of Appeal upheld the conviction and the trial court's ruling on the peremptory challenge. *People* v. *Collins*, No. B106939 (Dec. 12, 1997), App. to Pet. for Cert. 112–117. In its view, youth was a legitimate reason to exercise a peremptory challenge; and, even if it were not, Juror 16's demeanor also supported the strike.

Id., at 116. According to its review of the record, nothing suggested the trial court failed to conduct a searching inquiry of the prosecutor's reasons for striking Juror 16. *Id.*, at 116–117. The appeals court thus upheld the trial court's ultimate conclusion to credit the prosecutor. *Ibid.* Without comment, the Supreme Court of California denied Collins' petition for review. *Id.*, at 96.

Collins sought collateral relief on this claim in federal court. The United States District Court for the Central District of California dismissed with prejudice Collins' petition for a writ of habeas corpus. *Id.*, at 91. A divided panel of the Court of Appeals for the Ninth Circuit reversed and remanded with instructions to grant the petition. 348 F. 3d 1082 (2003), amended and superseded by 365 F. 3d 667 (2004). Noting that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governed Collins' petition, the panel majority concluded that it was an unreasonable factual determination to credit the prosecutor's race-neutral reasons for striking Juror 16. *Id.*, at 679. Judge Hall dissented, *id.*, at 687–691; and later, over the dissent of five judges, the Court of Appeals declined to rehear the case en banc, *id.*, at 670–673. Though it recited the proper standard of review, the panel majority improperly substituted its evaluation of the record for that of the state trial court. We granted the petition for certiorari, 545 U. S. ___ (2005), and now reverse.

II

A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. 476 U. S., at 96–97. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. *Id.*, at 97–98. Although the prosecutor must

present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"; so long as the reason is not inherently discriminatory, it suffices. *Purkett* v. *Elem*, 514 U. S. 765, 767–768 (1995) *(per curiam)*. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson*, *supra*, at 98; *Miller-El* v. *Dretke*, 545 U. S. ___, ___ (2005) (slip op., at 18). This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, *supra*, at 768.

On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. *Hernandez* v. *New York*, 500 U. S. 352, 364–366 (1991) (plurality opinion) (holding that evaluation of a prosecutor's credibility "lies 'peculiarly within a trial judge's province' "). Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §2254(d)(2). Thus, a federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence." §2254(e)(1). See *Miller-El*, *supra*, at ___ (slip op., at 6). Although the Ninth Circuit assumed §2254(e)(1)'s presumption applied in this case, 365 F. 3d, at 677, the parties disagree about whether and when it does. We need not address that question. Even assuming, *arguendo*, that only §2254(d)(2) applied in this proceeding, the state-court decision was not an unreasonable determination of the facts in light of the evidence presented in the state court.

Because the California Court of Appeal accepted the trial court's credibility finding, the panel majority inquired whether the appellate court made an unreasonable factual determination. See *id.*, at 682. The panel majority's analysis and conclusions, however, depended entirely on its view of the trial court's credibility holding. The panel majority found no error in the trial court's proceedings or rulings in the first two steps of the *Batson* inquiry. 365 F. 3d, at 677–678. It disagreed, however, with the trial court's conclusions on the third step, holding that it was unreasonable to accept the prosecutor's explanation that Juror 16 was excused on account of her youth and her demeanor. *Id.*, at 678–687. We conclude the Ninth Circuit erred, for the trial court's credibility determination was not unreasonable.

Noting that the trial court had not witnessed Juror 16's purported eye rolling, the panel majority concluded that no reasonable factfinder could have accepted the prosecutor's rendition of the alleged incident because the prosecutor's conduct completely undermined her credibility. *Id.*, at 683. Having before it only the trial court record, the Court of Appeals majority drew this conclusion based on three considerations: first, the prosecutor's erroneous statement concerning another prospective African-American juror's age; second, the prosecutor's improper attempt to use gender as a basis for exclusion; and third, the majority's skepticism toward the prosecutor's explanation that she struck Juror 16 in part because of her youth and lack of ties to the community. *Id.*, at 683–684.

The first reason the panel majority noted for rejecting the trial court's credibility finding pertained not to Juror 16, the subject of Collins' claim on appeal, but to another prospective African-American juror, Juror 19. The prosecutor referred to Juror 19 as "young" even though she was a grandmother. This reference to youth took place during a discussion about three prospective jurors, Jurors 6, 16,

and 19. Jurors 6 and 16 were both young. As Judge Hall observed, it is quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation, an error defense counsel may also have committed. *Id.*, at 688; 2 App. 9. It is a tenuous inference to say that an accidental reference with respect to one juror, Juror 19, undermines the prosecutor's credibility with respect to Juror 16. Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible.

Second, the panel majority concluded that the trial court should have questioned the prosecutor's credibility because of her "attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019." 365 F. 3d, at 684. Respondent's trial occurred in August 1996, over two years after our decision in *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127 (1994), made clear that discrimination in jury selection on the basis of gender violates the Equal Protection Clause. Although the record contains a somewhat confusing colloquy on this point, it can be read as indicating that one of the prosecutor's aims in striking Juror 16 was achieving gender balance on the jury. Concerned about the constitutionality of such a strike, the trial court made clear that it would not accept gender as a race-neutral explanation. The panel majority assigned the gender justification more weight than it can bear. The prosecutor provided a number of other permissible and plausible race-neutral reasons, and Collins provides no argument why this portion of the colloquy demonstrates that a reasonable factfinder must conclude the prosecutor lied about the eye rolling and struck Juror 16 based on her race.

Finally, the panel majority believed to be unsupportable the prosecutor's stated concern that Juror 16 might, as a young and single citizen with no ties to the community, be

too tolerant of the crime with which respondent was charged. 365 F. 3d, at 680–682, 684. This was so, the majority concluded, because during *voir dire* Juror 16 replied affirmatively when asked if she believed the crime with which respondent was charged should be illegal and disclaimed any other reason she could not be impartial. *Id.*, at 680. That the prosecutor claimed to hold such concerns despite Juror 16's *voir dire* averments does not establish that she offered a pretext. It is not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance. Accord, *id.*, at 690 (Hall, J., dissenting). Even if the prosecutor was overly cautious in this regard, her wariness of the young and the rootless could be seen as race neutral, for she used a peremptory strike on a white male juror, Juror 6, with the same characteristics. 2 App. 5, 14.

Viewing the panel majority's concerns together, the most generous reading would suggest only that the trial court had reason to question the prosecutor's credibility regarding Juror 16's alleged improper demeanor. That does not, however, compel the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude Collins had shown a *Batson* violation. Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination.

The panel majority did not stop at the conclusion that the trial court rendered an unreasonable factual determination in light of the evidence presented. It further concluded that the state courts had unreasonably applied clearly established federal law as determined by this Court. 365 F. 3d, at 679; 28 U. S. C. §2254(d)(1). The

question whether a state court errs in determining the facts is a different question from whether it errs in applying the law. In this case there is no demonstration that either the trial court or the California Court of Appeal acted contrary to clearly established federal law in recognizing and applying *Batson*'s burden-framework. See 2 App. 14–15; App. to Pet. for Cert. 114–116. The only question, as we have noted, is whether the trial court's factual determination at *Batson*'s third step was unreasonable. For the reasons discussed above, we conclude it was not.

III

The panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–52

BERTRAM RICE, WARDEN, ET AL., PETITIONERS *v.*
STEVEN MARTELL COLLINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 18, 2006]

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

Twenty years ago Justice Thurgood Marshall warned that the test of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), would fail to ferret out unconstitutional discrimination in the selection of jurors. *Id.*, at 102–103 (concurring opinion) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process"). In my view, history has proved Justice Marshall right. See *Miller-El* v. *Dretke*, 545 U. S. ___, ___ (2005) (slip op., at 1) (BREYER, J., concurring). And today's case, like *Miller-El*, helps to illustrate *Batson*'s fundamental failings.

For one thing, the prosecutor's inability in this case to provide a clear explanation of why she exercised her peremptory challenges may well reflect the more general fact that the exercise of a peremptory challenge can rest upon instinct not reason. Insofar as *Batson* asks prosecutors to explain the unexplainable, how can it succeed? *Miller-El*, 545 U. S., at ___ (slip op., at 2–3) (BREYER, J., concurring).

For another thing, the trial judge's uncertainty about the legal validity of the exercise of peremptory challenges in this case may reflect the more general fact that, sometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge

rests upon an impermissible racial, religious, gender-based, or ethnic stereotype. *Ibid.* See also *Batson*, *supra*, at 106 (Marshall, J., concurring) (noting unconscious internalization of racial stereotypes). How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor? *Miller-El*, *supra*, at ___ (slip op., at 2) (BREYER, J., concurring).

Finally, the case before us makes clear that ordinary mechanisms of judicial review cannot assure *Batson*'s effectiveness. The reasons are structural. The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*. See *Hernandez* v. *New York*, 500 U. S. 352 (1991). As the present case illustrates, considerations of federalism require federal habeas courts to show yet further deference to state-court judgments. See 28 U. S. C. §2254(d)(2) (state-court factual determination must stand unless "unreasonable").

The upshot is an unresolvable tension between, on the one hand, what Blackstone called an inherently "'arbitrary and capricious'" peremptory challenge system, *Miller-El*, *supra*, at ___ (slip op., at 7) (BREYER, J., concurring) (quoting 4 W. Blackstone, Commentaries on the Laws of England 346 (1769)), and, on the other hand, the Constitution's nondiscrimination command. Given this constitutional tension, we may have to choose. *Miller-El*, *supra*, at ___ (slip op., at 8) (BREYER, J., concurring); *Swain* v. *Alabama*, 380 U. S. 202, 244 (1965) (Goldberg, J.,

dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former"); *Batson*, *supra*, at 107 (Marshall, J., concurring) (same).

I have argued that legal life without peremptories is no longer unthinkable. *Miller-El*, *supra*, at ___ (slip op., at 6–7) (concurring opinion) (citing, *inter alia*, the experience of England). I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole. Nonetheless, because the Court correctly applies the present legal framework, I concur in its opinion.